Supreme Court, U.S.
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No. 011878

In The

Supreme Court of the United States

STATE OF HAWAII, *et al.*,

Petitioners,

v.

BRIAN VINSON, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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114 pages

QUESTION PRESENTED

Did the State of Hawaii, by accepting federal funds for its Department of Labor and Industrial Relations, waive its sovereign immunity against private suits for damages for violation of Section 504 of the Rehabilitation Act of 1973?

PARTIES

Petitioners, defendants-appellees in the court below, are the State of Hawaii, the Department of Labor and Industrial Relations of the State of Hawaii, and Alice Thomas in her official capacity as the Director of the Vocational Rehabilitation Branch of the Department of Labor and Industrial Relations of the State of Hawaii.

Respondents are Brian Vinson, plaintiff-appellant in the court below, and the United States of America, intervenor in the court below.

Alice Thomas, in her individual capacity, and Intracorp, a Delaware corporation, were also defendants-appellees in the court below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
PERTINENT STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	8
I. THE DECISION BELOW CONFLICTS WITH THE SECOND CIRCUIT'S DECISION IN *GARCIA*	11
II. THE NINTH CIRCUIT'S RULING IS INCONSISTENT WITH THIS COURT'S CONCLUSION THAT SECTION 2000d-7(a) IS AMBIGUOUS	16
III. REVIEW IS WARRANTED TO CONSIDER WHETHER THE CLEAR STATEMENT RULE PROHIBITS IMPLIED CAUSES OF ACTION AGAINST THE STATES	20
CONCLUSION	23

TABLE OF AUTHORITIES

Page

CASES

Alden v. Maine, 527 U.S. 706 (1999) 17, 20, 21, 22

Alexander v. Sandoval, 532 U.S. 275 (2001) 3, 9, 20, 22

Alsbrook v. Arkansas, 528 U.S. 1146 (2000) 5

Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) 9, 10, 17, 21

Barnes v. Gorman, No. 01-682, 536 U.S. ___ (June 17, 2002) ..... *passim*

Board of Trustees v. Garrett, 531 U.S. 356 (2001) ..... *passim*

Clark v. Barnard, 108 U.S. 436 (1883) 9

Clark v. California, 123 F.3d 1267 (9th Cir. 1997) 14

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) ..... *passim*

Court of Common Pleas of Ohio v. Popovich, No. 01-1503 (U.S. Apr. 8, 2002) 2, 5

Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) 9, 22

Douglas v. California Dep't of Youth Auth., 285 F.3d 1226 (9th Cir. 2002), *cert. denied on other grounds*, No. 01-1546 (U.S. June 17, 2002) ..... *passim*

Douglas v. California Dep't of Youth Auth., 271 F.3d 812 (9th Cir. 2001) 7, 8

Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn, 280 F.3d 98 (2d Cir. 2001) ..... *passim*

Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944) 9

TABLE OF AUTHORITIES – Continued

Page

Hason v. Medical Bd. of Cal., 279 F.3d 1167 (9th Cir. 2002), *petition for reh'g en banc filed* (Feb. 25, 2002) 6, 12, 13

Jim C v. United States, 235 F.3d 1079 (8th Cir. 2000) (en banc), *cert. denied*, 533 U.S. 949 (2001) 3, 15

Johnson v. Zerbst, 304 U.S. 458 (1938) 10, 11

Lane v. Pena, 518 U.S. 187 (1996) ..... *passim*

Lapides v. Bd. of Regents of Univ. Sys. of Ga., 122 S. Ct. 1640 (2002) 9

Litman v. George Mason Univ., 186 F.3d 544 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000) 14

Nihiser v. Ohio Envtl. Prot. Agency, 269 F.3d 626 (6th Cir. 2001), *cert. denied*, No. 01-1357 (June 17, 2002) 3, 14

Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999) 4

Pederson v. Louisiana State Univ., 213 F.3d 858 (5th Cir. 2000) 14

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) 10, 17

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) ..... *passim*

Popovich v. Cuyahoga County Court of Common Pleas, 276 F.3d 808 (2002), *petition for cert. filed*, No. 01-1503 (U.S. Apr. 8, 2002) 5, 16

Randolph v. Rogers, 253 F.3d 342 (8th Cir. 2001) 5

Reickenbacker v. Foster, 274 F.3d 974 (5th Cir. 2001) 5

TABLE OF AUTHORITIES – Continued

Page

Sandoval v. Hagan, 197 F.3d 484 (11th Cir. 1999), *rev'd on other grounds*, 532 U.S. 275 (2001) 14

Stanley v. Litscher, 213 F.3d 340 (7th Cir. 2000) 3, 14

Thompson v. Colorado, 258 F.3d 1241 (10th Cir. 2001), *cert. denied*, No. 01-1024 (U.S. May 20, 2002) 5

Walker v. Snyder, 213 F.3d 344 (7th Cir. 2000), *cert. denied*, 531 U.S. 1190 (2001) 5

STATUTES AND CODES

28 U.S.C. § 1254 1

42 U.S.C. § 12101 1

29 U.S.C. § 701 1

29 U.S.C. § 794(a) 3, 4

29 U.S.C. § 794a(a)(2) 3

29 U.S.C. § 794(b) 4

42 U.S.C. § 12132 4

42 U.S.C. § 12133 4

42 U.S.C. § 12202 ..... 4, 12

42 U.S.C. § 2000d-7 ..... 1, 3, 14, 22

42 U.S.C. § 2000d-7(a) 18, 19, 22

42 U.S.C. § 2000d-7(a)(1) 3, 21, 22

42 U.S.C. § 2000d-7(a)(2) 3, 9, 18, 19, 20

Pub. L. No. 99-506, 100 Stat. 1807 ..... 1, 3

PETITION FOR A WRIT OF CERTIORARI

The State of Hawaii, *et al.* ("petitioners"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 288 F.3d 1145 (9th Cir. 2002), and is reprinted in the Appendix ("App.") at 1a. The opinion of the district court is not reported; it is reprinted at App. 31a.

JURISDICTION

Judgment of the court of appeals was entered on May 3, 2002. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution and relevant provisions of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701, *et seq.*, the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, *et seq.*, and the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845, 42 U.S.C. § 2000d-7, are reprinted at App. 78a-83a.

STATEMENT

Invoking its authority under Section 5 of the Fourteenth Amendment, Congress has purported to abrogate the States' sovereign immunity against suits brought under two largely identical federal statutes – Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act ("ADA"). Most of the courts of appeals (though not the Ninth Circuit) have concluded that this effort is invalid under this Court's recent Section 5 jurisprudence, and the issue (which the Court has previously granted certiorari to resolve, but has not reached) is again presented in a currently pending petition for certiorari, *Court of Common Pleas of Ohio v. Popovich*, No. 01-1503 (U.S. Apr. 8, 2002).

This case presents the closely related question whether the States' acceptance of federal funds has effected a valid waiver of their sovereign immunity against Section 504 claims notwithstanding Congress' attempt to deprive them of immunity without regard to whether or not they have consented. The Circuits are divided on this question as well. The Second Circuit has held that, in these circumstances, a "§ 504 damage claim against New York fails because New York had not knowingly waived its sovereign immunity from suit" by accepting federal funds. *Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn*, 280 F.3d 98, 114-15 (2d Cir. 2001); *see also Douglas v. California Dep't of Youth Auth.*, 285 F.3d 1226, 1227-31 (9th Cir. 2002) (O'Scannlain, J., dissenting from the denial of rehearing en banc) (same), *cert. denied on other grounds*, No. 01-1546 (U.S. June 17, 2002). In contrast, four other courts of appeal, including the court below, have held that "States are subject to suit in federal court under section 504 of the Rehabilitation Act if they accept federal Rehabilitation

Act funds." App. 9a; *see also Nihiser v. Ohio Envtl. Prot. Agency*, 269 F.3d 626, 628 (6th Cir. 2001), *cert. denied*, No. 01-1357 (June 17, 2002); *Jim C v. United States*, 235 F.3d 1079, 1081-82 (8th Cir. 2000) (en banc), *cert. denied*, 533 U.S. 949 (2001); *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir. 2000).

1. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), states that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Section 505(a)(2) of the Act, 29 U.S.C. § 794a(a)(2), provides that the remedies for violations of Section 504 shall be those "set forth in title VI of the Civil Rights Act of 1964." While Congress has not expressly created a private cause of action for violations of Title VI, this Court has held that Congress implicitly intended to supply one. *See, e.g., Barnes v. Gorman*, No. 01-682, 536 U.S. ___, ___ (June 17, 2002), slip op. at 3; *Alexander v. Sandoval*, 532 U.S. 275, 279-80 (2001).

Section 1003 of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 100 Stat. 1845, 42 U.S.C. § 2000d-7, purports to subject the States to suit without regard for their sovereign immunity. It provides that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973." 42 U.S.C. § 2000d-7(a)(1). Section 2000d-7(a)(2) limits the remedies available "[i]n a suit against a State for a violation of a statute referred to in paragraph (1)" to those "available for such a violation to the same extent as such remedies are available for such a

violation in the suit against any public or private entity other than a State."

2. The proscriptions imposed by Section 504 are "virtually identical" to those set forth in Title II of the ADA. *Garcia*, 280 F.3d at 114. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from the participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." ADA § 202; 42 U.S.C. § 12132; *compare* 29 U.S.C. § 794(a). Moreover, the remedies afforded for violations of Title II are those provided for violations of Section 504. ADA § 203, 42 U.S.C. § 12133 (adopting "[t]he remedies, procedures, and rights" provided by Section 505 of the Rehabilitation Act for violations of Title II); *see also Barnes*, *supra*, slip op. at 3; *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 590 (1999). And as with Section 504, Congress has purported to abrogate the States' sovereign immunity against suits brought under the ADA. 42 U.S.C. § 12202. Indeed, the only difference between the two statutes is that Section 504 applies to "any program or activity receiving Federal financial assistance," 29 U.S.C. § 794(a),[1] while Title II of the ADA governs all public entities, including the States.

3. In *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), this Court held that Congress' attempt, in 42 U.S.C. § 12202, to abrogate States' sovereign immunity

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[1] Congress has defined "program or activity" to include the particular state department or agency that receives federal funds. Rehabilitation Act § 504(b), 29 U.S.C. § 794(b).

with respect to Title I of the ADA is constitutionally invalid because Title I is not a proper exercise of Congress' authority under Section 5 of the Fourteenth Amendment. Although the question presented in *Garrett* encompassed Title II of the ADA as well as Title I, the Court chose not to resolve it because it was not briefed. 531 U.S. at 360 n.1. The Court had previously granted certiorari to address abrogation of State sovereign immunity under Title II in *Alsbrook v. Arkansas*, 528 U.S. 1146 (2000), but that case settled and certiorari was dismissed. 529 U.S. 1001 (2000).

Since *Garrett*, several Circuits have addressed the Title II question, and reached divergent answers to it. The Fifth, Seventh, Eighth, and Tenth Circuits have held that Title II cannot be justified under the Congress' Section 5 power and that the States retain their sovereign immunity from suit under Title II. *Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001); *Thompson v. Colorado*, 258 F.3d 1241 (10th Cir. 2001), *cert. denied*, No. 01-1024 (U.S. May 20, 2002); *Randolph v. Rogers*, 253 F.3d 342, 345 n.4 (8th Cir. 2001) (following pre-*Garrett* Circuit precedent); *Walker v. Snyder*, 213 F.3d 344 (7th Cir. 2000), *cert. denied*, 531 U.S. 1190 (2001). The Second and Sixth Circuits have held that Title II is a valid exercise of Section 5 power in some circumstances, but not in others. *Garcia*, 280 F.3d at 110 ("Title II in its entirety exceeds Congress's authority under § 5," but suits for damages nevertheless are permissible against the States where the alleged violation is motivated by discriminatory animus or ill will); *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (2002) (en banc) (Title II claims sounding in due process may be brought against the States, but those sounding in equal protection are foreclosed by *Garrett*), *petition for cert. filed*, No. 01-1503 (U.S. Apr. 8, 2002).

Since *Garrett*, only the Ninth Circuit has held that Title II categorically abrogates the States' sovereign immunity. *Hason v. Medical Bd. of Cal.*, 279 F.3d 1167 (9th Cir. 2002), *petition for reh'g en banc filed* (Feb. 25, 2002). As a result, States in the Ninth Circuit are subject to suit in federal court for violations of Title II without their consent. Thus, in the Ninth Circuit, States may be sued in federal court for claims of discrimination in any "program or activity" brought by a "qualified individual with a disability," regardless of whether or not the relevant department or agency of the State chooses to accept federal funds.

4. Respondent Brian Vinson brought this suit in the District Court against petitioners, alleging violations of, *inter alia*, Section 504 of the Rehabilitation Act and Title II of the ADA. App. 2a. Respondent claimed that he was dyslexic and that petitioners had failed to reasonably accommodate his dyslexia in providing vocational rehabilitation benefits. App. 2a-9a. Specifically, petitioners refused to provide additional benefits to accommodate respondent's alleged dyslexia absent medical documentation confirming that he was indeed dyslexic. App. 4a-8a. After this suit was filed, petitioners granted respondent the benefits he sought, but respondent "continues to seek monetary damages from [petitioners] for what he alleges to be severe emotional distress suffered as a result of their earlier refusal to approve a rehabilitation plan that would include accommodations for his dyslexia." App. 9a.

On February 28, 2000, the District Court entered an order granting summary judgment on all of respondent's claims. App. 76a. Although the trial court rejected respondent's claims on the merits, it also held in the alternative that the claims were barred by the State's sovereign

immunity. App. 74a n.14 ("the Eleventh Amendment bars suit against DLIR and Thomas in her official capacity to the extent Plaintiff's ... claims would require money damages against the state").

5. After oral argument in the Court of Appeals in this case, another Ninth Circuit panel held "that by accepting federal Rehabilitation Act funds, California has waived its sovereign immunity under the Rehabilitation Act. We adhere to our [pre-*Garrett* Circuit precedent] and conclude that the clear waiver language of the Rehabilitation Act conditions the receipt of federal funds under the Rehabilitation Act upon a state's agreement to forgo the Eleventh Amendment defense." *Douglas v. California Dep't of Youth Auth.*, 271 F.3d 812, 820-21 (9th Cir. 2001).

Judge O'Scannlain, joined by Judges Kozinski, Kleinfeld, and Gould, dissented from the denial of rehearing en banc. *Douglas v. California Dep't of Youth Auth.*, 285 F.3d 1226 (9th Cir. 2002). Emphasizing this Court's teaching that the State's waiver of sovereign immunity must be knowing and intentional, the dissenters maintained that the acceptance of federal funds does not indicate a knowing and intentional State decision to consent to suit in federal court because Congress had independently stripped the State of its sovereign immunity with respect to the very same cause of action and remedy in the ADA. *Id.* at 1229-31. Judge O'Scannlain emphasized that "the proscriptions of the ADA and § 504 are virtually identical," and, as the Second Circuit had explained in *Garcia*, "'a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits, since by all reasonable appearances state sovereign immunity had

already been lost.'" *Id.* at 1231 (quoting *Garcia*, 280 F.3d at 114).[2]

6. In the decision below, the Court of Appeals held that the State's assertion of sovereign immunity against respondent's Section 504 claim was "foreclosed by our recent decision in *Douglas*." App. 9a.[3] On the merits, the court reversed as well, holding that genuine issues of material fact precluded entry of summary judgment for petitioners. App. 9a-16a. Judge O'Scannlain reiterated his "disagreement with [the Ninth Circuit's] approach to the question of sovereign immunity waiver," but "reluctantly acquiesc[ed]" in the panel's decision on the issue in this case in light of the binding Circuit precedent of *Douglas*. App. 22a (O'Scannlain, J., dissenting). Judge O'Scannlain also dissented on the merits, stating that he would have affirmed the District Court's grant of summary judgment. App. 22a-30a.

REASONS FOR GRANTING THE PETITION

Review is warranted in this case because the decision below conflicts with the Second Circuit's holding in *Garcia*; acceptance of federal funds does not manifest a clear and voluntary waiver of sovereign immunity against Section

[2] A petition for certiorari is pending in *Douglas*, No. 01-1546, but petitioners in that case are not seeking review of the question presented here, whether acceptance of federal funds effects a waiver of State sovereign immunity against Section 504 claims.

[3] At oral argument in the Court of Appeals, respondent abandoned his Title II claim against petitioners in light of the fact that Section 504 provides identical rights and remedies. App. 2a n.1.

504 claims because Congress has not given the States an option that they may freely accept or reject. Moreover, the Ninth Circuit's ruling is inconsistent with this Court's conclusion, reached in the corresponding context of federal sovereign immunity, that the statute said to have invited the States to waive their sovereign immunity, 42 U.S.C. § 2000d-7(a)(2), is ambiguous as to whether money damages are authorized. *See Lane v. Pena*, 518 U.S. 187, 198-200 (1996). Finally, certiorari should be granted to permit the Court to resolve the question presented but not resolved last Term, whether "implied causes of action against States (and perhaps nonfederal state actors generally) are inconsistent with the clear statement rule of *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981)." *Alexander*, 532 U.S. at 293 (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 684-85 (1999) (Kennedy, J., dissenting)).

This Court has "long recognized that a State's sovereign immunity is 'a personal privilege which it may waive at pleasure.'" *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) (quoting *Clark v. Barnard*, 108 U.S. 436, 447 (1883)). Consistent with the constitutional magnitude of this right, however, "[t]he test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985). The Court will not find consent to suit unless "the State makes a 'clear declaration' that it intends to submit itself to our jurisdiction." *College Sav. Bank*, 527 U.S. at 676 (quoting *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944)); *see also Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 122 S. Ct. 1640, 1644 (2002) (noting requirement of "a 'clear' indication of the

State's intent to waive its immunity," and finding requisite clarity in State's voluntary removal of suit to federal court); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (*Pennhurst II*) (State's consent to suit in federal court must be "unequivocally expressed"). As with the waiver of any other constitutional right, the Court has held that an effective waiver of sovereign immunity requires an "'intentional relinquishment or abandonment of a known right or privilege.'" *College Sav. Bank*, 527 U.S. at 682 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

While the Court has never so held, *dicta* in a number of its cases have suggested that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions [including, presumably, waiver of sovereign immunity] that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions." *College Sav. Bank*, 527 U.S. at 686. But the Court has specifically held that "mere receipt of federal funds cannot establish that a State has consented to suit in federal court." *Atascadero*, 473 U.S. at 246-47.

Accordingly, for acceptance of federal funds to give rise to a waiver of sovereign immunity, essential preconditions must be satisfied. First, the statute purporting to exercise the spending power in this fashion must "manifest[] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Id.* at 247. Such a clear statement is essential to informing a State's waiver. "There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose

a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (*Pennhurst I*).[4] Second, the State's acceptance of the money must clearly and unambiguously evidence its knowing intention to relinquish its immunity. *See, e.g., College Sav. Bank*, 527 U.S. at 682.

I. THE DECISION BELOW CONFLICTS WITH THE SECOND CIRCUIT'S DECISION IN *GARCIA*.

Acceptance of Rehabilitation Act funds could not give rise to a valid waiver of sovereign immunity during the period at issue here because the States could not have understood that, by taking the federal money, they were relinquishing sovereign immunity that they otherwise enjoyed. It is settled that waiver of a State's sovereign immunity, like waiver of any other constitutional right, requires the "'*intentional* relinquishment or abandonment of a *known* right or privilege.'" *College Sav. Bank*, 527 U.S. at 682 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)) (emphases added). At the time Hawaii accepted the federal funds that purportedly effected a waiver of its sovereign immunity from suits for discrimination against

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[4] Indeed, the Court has insisted that such clarity is necessary to preserve "[t]he legitimacy of Congress' power to legislate under the spending power," even in cases where the recipient is not a State said to have waived an independent constitutional right to sovereign immunity. *Barnes, supra*, slip op. at 4-5 (quoting *Pennhurst I*, 451 U.S. at 17). Where, as here, acceptance of federal funds is claimed to effect a waiver of sovereign immunity, the clear statement rule applies with special force in accordance with the Court's general rule that waiver of a constitutional right requires an "'intentional relinquishment or abandonment of a known right or privilege.'" *College Sav. Bank*, 527 U.S. at 682 (citation omitted).

the disabled in any program or activity, Congress had *already deprived* the State of its immunity from such suits in Title II of the ADA. *See* 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act.").

Because Congress unilaterally abrogated the States' immunity against suits for discrimination against the disabled under Title II, Hawaii could not have "intentionally relinquished" its sovereign immunity against such suits under Section 504, for it necessarily believed that it had none to relinquish. In such a circumstance, there could be no waiver of sovereign immunity, which, "no less than the right to trial by jury in criminal cases, is constitutionally protected." *College Sav. Bank*, 527 U.S. at 682.

The violations of the Rehabilitation Act that petitioner alleges ended no later than March 1997. *See* App. 43a. This Court did not decide *Garrett* until four years later, in February 2001; as both the Second Circuit and Judge O'Scannlain have explained, *Garrett* provided the first "colorable basis" for the States to suspect that, by accepting federal funds, they were relinquishing sovereign immunity under the Rehabilitation Act that they might otherwise remain constitutionally entitled to assert under the ADA. *Garcia*, 280 F.3d at 114 n.4; *Douglas*, 285 F.3d at 1229-30 (O'Scannlain, J., dissenting from denial of rehearing en banc). Indeed, even today, the States in the Ninth Circuit have no such "colorable basis" for believing that acceptance of federal money relinquishes a right they otherwise enjoy, for the Ninth Circuit has, since *Garrett*, upheld Congress' abrogation of sovereign immunity against claims under Title II of the ADA. *See Hason v.*

Medical Bd. of Cal., 279 F.3d 1167 (9th Cir. 2002), *petition for reh'g en banc filed* (Feb. 25, 2002). Thus, according to the Ninth Circuit, Hawaii is susceptible to suits such as that brought by petitioner regardless of whether it chooses to accept or reject federal funds.

In sum, from the perspective of Hawaii, its only choice was to accept or refuse federal funds; in either event, according to Congress and the Ninth Circuit, Hawaii lacked sovereign immunity with respect to the very same cause of action and remedies provided under the Rehabilitation Act. Hawaii therefore lacked any meaningful choice of retaining its sovereign immunity and there obviously could be no "intentional relinquishment" of a "known" constitutional right. *College Sav. Bank*, 527 U.S. at 682.

Only by ignoring this inquiry altogether did the Court of Appeals (and the Circuits it has joined) find a valid waiver. The one Circuit that has actually addressed the question whether States' supposed waiver of sovereign immunity under the Rehabilitation Act satisfied the relevant standard – as opposed to skipping over this question – has held that it did not. In *Garcia*, the Second Circuit held that New York had not waived its sovereign immunity by taking Rehabilitation Act funds. "[A] state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits, *College Savings Bank*, 527 U.S. at 682, since by all reasonable appearances state sovereign immunity had already been lost." 280 F.3d at 114. After all, "Title II of the ADA was reasonably understood to abrogate New York's sovereign immunity," and "the proscriptions of Title II and § 504 are virtually identical." *Id.* The Second Circuit correctly

observed that the contrary decisions of other Circuits simply ignore the proper analysis and

> are unpersuasive because they focus exclusively on whether Congress clearly expressed its intention to condition waiver on the receipt of funds and whether the state in fact received the funds. None of these cases considered whether the state, in accepting the funds, believed it was actually relinquishing its right to sovereign immunity so as to make the consent meaningful as the Supreme Court required in *College Savings Bank*, 527 U.S. at 682.

Id. at 115 n.5 (citing *Jim C*, 235 F.3d at 1081-82, and *Clark v. California*, 123 F.3d 1267, 1271 (9th Cir. 1997)).[5] Likewise, the dissenters from the Ninth Circuit's denial of rehearing in *Douglas* explained that those contrary decisions fail to "reconcile the tension between Spending Clause and sovereign immunity jurisprudence," whereby the Congress is free to induce waiver by the States, but

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[5] As noted above, in addition to the Eighth and Ninth Circuits, the Sixth and Seventh Circuits have held that acceptance of federal funds waives State sovereign immunity against Section 504 claims. *Nihiser*, 269 F.3d at 628; *Stanley*, 213 F.3d at 344. The Fourth, Fifth, and Eleventh Circuits have reached similar conclusions in cases involving claims brought under Title IX of the Education Amendments of 1972 (which are also covered by 42 U.S.C. § 2000d-7). *See Pederson v. Louisiana State Univ.*, 213 F.3d 858, 875-76 (5th Cir. 2000); *Sandoval v. Hagan*, 197 F.3d 484, 493-94 (11th Cir. 1999), *rev'd on other grounds*, 532 U.S. 275 (2001); *Litman v. George Mason Univ.*, 186 F.3d 544, 554 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000). None of these courts inquired whether the acceptance evidenced the "'*intentional* relinquishment or abandonment of a *known* right or privilege.'" *College Sav. Bank*, 527 U.S. at 682 (emphases added) (citation omitted).

any such "waiver of a constitutional right must be intentional and knowing." 285 F.3d at 1231 (O'Scannlain, J., dissenting from denial of rehearing en banc).

Four Members of the Eighth Circuit have likewise concluded that State acceptance of federal funds does not effect a waiver of sovereign immunity against Section 504 suits, albeit on the basis of reasoning that differs from that of the Second Circuit in *Garcia* and Judge O'Scannlain and his dissenting colleagues in *Douglas*. Judge Bowman, joined by Judges Beam, Loken, and Bye, identified "two separate, independent reasons" for rejecting the conclusion that acceptance of federal funds effected a waiver. *Jim C*, 235 F.3d at 1082 (Bowman, J., dissenting). First, they believed that the alleged waiver had effectively been coerced by virtue of the overwhelming importance of the federal funds at issue. *Id.* at 1082-83 (Bowman, J., dissenting). Second, Judge Bowman and his colleagues concluded that waiver of immunity against Section 504 claims bore little if any relationship to the purpose of the federal funding. *Id.* at 1083-84. They found both of these points particularly salient in view of their conclusion (shared by the majority in *Jim C*) that Congress lacked the power, under Section 5 of the Fourteenth Amendment, to unilaterally abrogate the States' sovereign immunity. Accordingly, Judge Bowman concluded:

> By resort to the spending power . . . , Congress could achieve indirectly the same abrogation of Eleventh Amendment immunity it could not achieve directly. . . . Truly, the view of the Spending Clause taken by the majority of the Court in today's decision gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such

> as are self-imposed." It seems quite clear to me that the Framers never intended the Spending Clause to become an enabling provision for the otherwise unconstitutional exercise of federal power over the states. . . . If our Court will not take a hard look at the anomaly created by a "spending power uber alles" mentality, perhaps the Supreme Court will.

Id. at 1085 (Bowman, J., dissenting) (quoting *United States v. Butler*, 297 U.S. 1, 78 (1936)).

Review is warranted to resolve this square conflict among the Circuits as to when the States' constitutional right to immunity from suit will be deemed waived. Review is particularly appropriate in view of the fact that the closely related question whether Title II of the ADA is a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment (on which this Court has already twice granted certiorari) is again before the Court in the pending petition in *Popovich*, No. 01-1503. Conservation of this Court's limited resources counsels strongly in favor of resolving these closely related circuit splits in tandem.

II. THE NINTH CIRCUIT'S RULING IS INCONSISTENT WITH THIS COURT'S CONCLUSION THAT SECTION 2000d-7(a) IS AMBIGUOUS.

In *Lane v. Pena*, 518 U.S. 187 (1996), this Court held that "[t]o sustain a claim that the [federal] Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Id.* at 192; *see also id.* at 197 ("'[W]here a cause of action is authorized against the federal government, the available remedies are not those that are "appropriate," but only those for which sovereign immunity

has been expressly waived.'") (quoting Government's brief). Indeed, this Court recently extended this principle to Section 504 claims brought against *non-States*, holding that just as the Court has "applied the contract-law analogy in finding a damages remedy available in private suits under Spending Clause legislation[,] . . . [t]he same analogy applies we think, in determining the *scope* of damages remedies." *Barnes*, *supra*, slip op. at 5 (emphasis in original). Where Congress is not only regulating under the Spending Clause, but also purporting to invite a waiver of a constitutional right, this Court's precedents require exacting application of the clear statement rule. *See, e.g., Atascadero*, 473 U.S. at 241, 246-47; *Pennhurst II*, 465 U.S. at 99.

Moreover, it is now settled that State assertions of sovereign immunity are entitled to the same dignity as those made by the federal government. *See Alden v. Maine*, 527 U.S. 706, 749-50 (1999) ("In light of our constitutional system recognizing the essential sovereignty of the States, we are reluctant to conclude that the States are not entitled to a reciprocal privilege" to the immunity enjoyed by the federal government.); *College Sav. Bank*, 527 U.S. at 682 ("[T]he context of *federal* sovereign immunity [is] obviously the closest analogy" to state sovereign immunity.) (emphasis added). This Court has also held that in order for Congress to condition funds upon a waiver of state sovereign immunity, "it must do so unambiguously." *Pennhurst I*, 451 U.S. at 17. Thus, any act of Congress purporting to condition a grant of federal money upon States' consent to be "liable for awards of monetary damages . . . must extend unambiguously to such monetary claims." *Lane*, 518 U.S. at 192.

The 1986 amendment to the Rehabilitation Act, however, does not "unambiguously" state that any waiver of sovereign immunity would extend to suits for money damages. The first paragraph of 42 U.S.C. § 2000d-7(a) provides simply that "[a] State shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973." That language may alert States that acceptance of federal funds exposes them generally to suit under the Rehabilitation Act, but it surely says nothing about suits for monetary damages.

Instead, only the second paragraph of Section 2000d-7(a) addresses specific remedies, and it is *entirely ambiguous* regarding whether it exposes States to claims for monetary damages. It provides that, "[i]n a suit against a State for a violation of [Section 504], remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State." 42 U.S.C. § 2000d-7(a)(2). There can be no reasonable dispute that this provision is ambiguous, because this Court has already held that it is.

In *Lane*, the Court stated that the relevant sentence can plausibly be read "to subject the States to the scope of remedies available against *either* public or private § 504 defendants, whatever the *lesser* (or perhaps the greater) of those remedies might be." 518 U.S. at 199 (second emphasis added). In other words, if remedies are not available against some public entities (for example, federal agencies), then they are likewise not available against the States; and a litigant may not seek from the State the

greater remedies – namely, money damages – available against private defendants under Section 504. Indeed,

> if the same remedies are available against all governmental and nongovernmental defendants under § 504(a), the "public or private" language is entirely superfluous. Congress could have achieved the result [of subjecting states to the full remedies available against a private defendant] simply by subjecting States to the same remedies available against "every other entity," without further elaboration.

Id. at 199 (citation omitted). Because *Lane* holds that monetary damages for violation of Section 504 are not available against federal public entities, neither are they available against States.

To be sure, this Court in *Lane* said that Section 2000d-7(a)(2) could "perhaps" be read to subject States to the "greater" set of remedies (i.e., those available against private entities, including money damages); the Court also said that "public entities" could be read to refer exclusively to non-federal public entities. *See* 518 U.S. at 199. But the mere existence of competing readings, each of which is plausible, necessarily demonstrates the absence of the clear statement that is required in order to put the States on notice that acceptance of federal funds effects a waiver of sovereign immunity. As this Court held in *Lane*, Section 2000d-7(a) "is not so free of ambiguity that we can comfortably conclude, based thereon, that Congress intended to subject the Federal Government to awards of monetary damages for violations of § 504(a) of the Act." 518 U.S. at 200. Because of that same ambiguity, Congress has not set forth a clear statement notifying the States that accepting

Rehabilitation Act funds waives sovereign immunity with respect to claims for monetary damages.

This Court has already instructed in *Alden* and *College Savings Bank* that the constitutional status of the sovereign immunity of a State corresponds with that of the federal government; in *Pennhurst I*, that an "unambiguous" statement is prerequisite to a waiver of States' sovereign immunity, just as it is to a waiver of federal sovereign immunity; and in *Lane*, that 42 U.S.C. § 2000d-7(a)(2) is too ambiguous to effect waiver of federal sovereign immunity with respect to money damages. Certiorari is warranted because the decision below, authorizing a suit for money damages, is contrary to these instructions.

III. REVIEW IS WARRANTED TO CONSIDER WHETHER THE CLEAR STATEMENT RULE PROHIBITS IMPLIED CAUSES OF ACTION AGAINST THE STATES.

Section 505(a)(2) of the Rehabilitation Act provides that the remedies for violations of Section 504 shall be those available under Title VI. "Although Title VI does not mention a private right of action, [this Court's] prior decisions have found an *implied* right of action, and Congress has acknowledged this right in amendments to the statute, leaving it 'beyond dispute that private individuals may sue to enforce' Title VI." *Barnes*, *supra*, slip op. at 3 (emphasis in original) (quoting *Alexander*, 532 U.S. at 280). Nevertheless, because Congress has not expressly created a cause of action, this Court has held that such suits may not be brought against the United States. In *Lane*, the Court rejected the plaintiff's argument that the Court's decisions establishing a private cause of action under Title VI also "establish a waiver of

the Federal Government's sovereign immunity against monetary damages awards for violations of § 504(a)." 518 U.S. at 191-92. Reading an implied waiver of sovereign immunity into the Rehabilitation Act, the Court held, would contradict the "requirement firmly grounded in our precedents: A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied." *Id.* at 191-92 (citations omitted).

Just as Congress must clearly state its intention to waive the federal government's own sovereign immunity, this Court has consistently required Congress to "manifest[ ] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Atascadero*, 473 U.S. at 247; *see also Pennhurst I*, 451 U.S. at 17 ("By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation."). As noted above, *Alden* and *College Savings Bank* instruct that States' assertions of sovereign immunity deserve the same deference as those of the federal government. Accordingly, it follows that the result in *Lane* – that the clear statement rule applicable to waivers of federal sovereign immunity is not satisfied where the suit is brought on an implied cause of action – applies equally in the context of the clear statement rule governing congressional invitations to the States to waive sovereign immunity by accepting federal funds.

Congress' enactment of 42 U.S.C. § 2000d-7(a)(1) does not change this analysis. That provision states that States "shall not be immune under the Eleventh Amendment . . . for a violation of section 504." This prescription by no

means *creates* a cause of action; rather, it *assumes* that a cause of action has been supplied elsewhere. Accordingly, this Court has characterized Section 2000d-7 as implicitly "ratif[ying]" or "validat[ing]" the judicially implied cause of action. *Alexander*, 532 U.S. at 279-80; *see also Barnes, supra*, slip op. at 3 ("Congress has acknowledged" the existence of an implied right of action). Such an implicit ratification cannot satisfy the clear statement rule. A State reviewing the United States Code was not put on notice by Section 2000d-7(a)(1) that accepting federal money exposed it to suits for money damages under Section 504. At most, Section 2000d-7(a) puts the States on notice that they should look elsewhere for a cause of action. But a search of the United States Code for a statute creating a cause of action for violations of Section 504 would be fruitless, for Section 2000d-7 itself indisputably does not create such a cause of action, nor does any other enactment by the Congress.

Indeed, in the same opinion in which it characterized Section 2000d-7 as "ratif[ying]" or "validat[ing]" the implied cause of action for violations of Title VI claims, the Court acknowledged, but did not resolve, the question whether "implied causes of action against States (and perhaps nonfederal state actors generally) are inconsistent with the clear statement rule of *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981)." *Alexander*, 532 U.S. at 293 (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 656-57, 684-85 (1999) (Kennedy, J., dissenting)). The Court should now take up and resolve this important question. It has instructed in *Pennhurst I*, *Lane*, *Alden*, and *College Savings Bank* that a clear statement by Congress is a prerequisite to a State waiving its sovereign immunity through the acceptance of federal

funds; and it has held that a statute's ambiguity defeats any such waiver. It follows *a fortiori* that the failure of Congress to make *any* statutory statement regarding the availability of a private cause of action cannot give rise to a valid waiver of a State's sovereign immunity from private suits for money damages.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the petition for a writ of certiorari be granted.

June 20, 2002

Respectfully submitted,

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288 F.3d 1145

BRIAN VINSON, Plaintiff-Appellant, UNITED STATES OF AMERICA, Intervenor, v. ALICE THOMAS, individually and in her capacity as the Director of the Vocational Rehabilitation Branch of the Department of Labor and Industrial Relations, State of Hawaii; DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, STATE OF HAWAII; INTRACORP, a duly organized and incorporated Delaware corporation, Defendants-Appellees.

No. 00-15534

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

November 2, 2001, Argued and Submitted, Honolulu, Hawaii

May 3, 2002, Filed

COUNSEL:

Michael K. Livingston, Honolulu, Hawaii, for the plaintiff-appellant.

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Seth M. Galanter, United States Department of Justice, Washington, D.C., for intervenor United States of America.

JUDGES:

Before: David R. Thompson, Diarmuid F. O'Scannlain, and Marsha S. Berzon, Circuit Judges. Opinion by Judge Thompson; Dissent by Judge O'Scannlain.

OPINION BY:

David R. Thompson

OPINION:

THOMPSON, Circuit Judge: Brian Vinson ("Vinson") filed suit against Alice Thomas ("Thomas") and the State of Hawaii Department of Labor and Industrial Relations ("DLIR") (collectively "the defendants") claiming they denied him vocational rehabilitation services in violation of his rights under Title II of the ADA and section 504 of the Rehabilitation Act. The district court granted summary judgment in favor of the defendants. Vinson appeals.

Consistent with our recent decision in *Douglas v. California Department of Youth Authority,* 271 F.3d 812, *as amended,* 271 F.3d 910 (9th Cir. 2001), we hold that by its acceptance of federal Rehabilitation Act funds, the State waived its Eleventh Amendment immunity as to Vinson's claim under section 504 of the Rehabilitation Act. We also conclude that genuine issues of material fact exist which preclude summary judgment on that claim. Thus, we reverse the district court's summary judgment in favor of the DLIR on Vinson's Rehabilitation Act claim.[1]

Vinson's claims against the individual defendant, Thomas, were asserted under 42 U.S.C. § 1983. The only § 1983 claim preserved in this appeal is the claim that, acting in her individual capacity, Thomas violated Vinson's federal rights under the ADA and the Rehabilitation Act.

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[1] At oral argument, Vinson waived any separate claim against the DLIR under Title II of the ADA, content to rely on analogous rights and remedies under section 504 of the Rehabilitation Act.

We conclude Vinson may not pursue a section 1983 claim against Thomas in her individual capacity for her alleged violation of either the ADA or the Rehabilitation Act, and thus we affirm the district court's summary judgment in favor of Thomas.

I

In August 1993, Vinson injured his neck and back while working for a flooring company. He received workers' compensation benefits, including vocational rehabilitation benefits paid for by his employer's workers' compensation carrier. The insurance carrier contracted with Intracorp, a private contractor, to develop and manage a vocational rehabilitation plan for Vinson. Intracorp referred Vinson to rehabilitation specialist, Barbara Boddy, for evaluation.

Vinson told Boddy that he had dyslexia. Boddy adjusted her testing to accommodate Vinson's self-reported dyslexia by giving him both the General Aptitude Test Battery (GATB) and Non-Reading Aptitude Test Battery (NATB). After this testing, Boddy believed that a two-year college program would be an important element of Vinson's vocational rehabilitation, and that he could succeed in such a program so long as he received "some special assistance such as a note taker, tape recorder, or consideration for extra time on tests." Boddy further indicated that it might take Vinson "longer than average" to complete a two-year college program and that Vinson would "have to be a very serious and dedicated student to accomplish his goal."

In the spring of 1995, Vinson enrolled at Honolulu Community College ("the college") where he attended classes through the summer of 1996. Vinson took only 9

units per semester, rather than the customary 12. Nonetheless, the college considered him to be a full-time student because of his long-standing history of a learning disability. Throughout this period, his employer's workers' compensation carrier, under no obligation to do so, voluntarily paid for Vinson's schooling as part of his vocational rehabilitation.

In April 1996, Intracorp sought approval from the DLIR of a State-funded rehabilitation plan for Vinson that would provide him with a two-year community college education with accommodations for his dyslexia, including a reduced courseload and the use of computer hardware and software. Initially, DLIR representatives told Intracorp that Vinson had to take at least 12 units per semester, which the college considered full-time. Although he preferred to take only 9 units per semester, Vinson indicated he would be willing to attempt 12 units so long as the State provided him with appropriate computer hardware and software for persons with dyslexia.[2]

Soon thereafter, Alice Thomas, the vocational rehabilitation supervisor at the DLIR, decided that Vinson should take not just 12, but 15 units per semester so that he would complete the college program sooner. She also stated that he had to demonstrate he could meet "competitive standards," as measured by a 15-credit course-load, so that the DLIR would be assured that he could work and

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[2] Vinson's expert recommended that he be provided with a laptop computer equipped with voice recognition software, to assist him in taking notes and preparing assignments.

compete in an average labor market once his schooling was completed.[3]

At this point, Vinson's workers' compensation attorney got involved. He sent a letter to Intracorp and to Alice Thomas at the DLIR formally requesting that Vinson be permitted to take 9 units per semester and be provided with an appropriate computer. Thomas, however, remained of the view that Vinson required neither a reduced course-load nor a special computer. She also was not persuaded that he suffered from dyslexia. Thus, by letter dated July 12, 1996, Thomas asked Vinson's attorney to submit "any and all medical information (to include but not limited to diagnoses and limitations) regarding [Vinson's] unrelated disability."[4]

On July 25, 1996, Vinson's attorney responded with a letter which included the following attachments: (1) a July 8, 1996 letter from the college indicating that Vinson had a long-standing history of a learning disability, that the college recognized him as a full-time student with nine credits on account of his disability, and that he required a reduced course load in order to continue to progress in his studies; (2) a March 20, 1996 letter from Learning Disability Specialist Lynne Douglas at Leeward Community College stating that upon review of Vinson's past history and existing diagnostic documents Vinson could benefit from computer based programs; and (3) a March 7, 1996

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[3] Thomas arrived at her figure of 15 units per semester by dividing the total units required to complete the A.S. degree sought by Vinson (60 units), by the total number of semesters ordinarily taken to complete the degree (4 semesters).

[4] Apparently "unrelated" referred to the fact that Vinson's dyslexia was unrelated to his workplace injury.

letter from the college noting that Vinson had a "long-standing learning disability, Dyslexia," and recommending that he be permitted to take a reduced course-load and be provided with computer hardware and software.

Thomas responded by letter on July 26, 1996 clarifying that she needed the following documentation regarding Vinson's claim of disability:

> 1. Verifiable, medical/psychological evidence establishing a disability exists (diagnosis, test scores, etc.,)
>
> 2. Specific physical/psychological limitations (medically established) experienced by *your claimant.*
>
> 3. The credentials and reports of the experts referred to in your previous correspondence who, based on said limitations, identified appropriate accommodations. (Emphasis in original.)

On July 30, 1996, Vinson's attorney sent Thomas another letter stating that he would try to provide the information requested, but that the diagnostic "evidence" sought by the DLIR probably did not exist. On August 2, 1996, Thomas responded by letter stating that the only evidence in the program file that Vinson had dyslexia was his own self-report. She further clarified her request for information:

> For guidance as to what evidence is needed the *Diagnostic and Statistical Manual* addresses diagnostic criteria. Providing us with diagnosis, psychological/physical limitations, and current medical status (defined as stability

of limitations) may allow us to identify reasonable accommodations at HAR 12-14-5(a)(4) or at least clarify the need to revisit HAR 12-14- 5(a)(3).

For the record, your claimant's request to take nine credits a semester rather than meet the competitive standard of fifteen, would represent a 75% increase in plan duration.

Thomas placed Vinson's rehabilitation case in suspended/interrupted status for 60 days to allow him time to submit the additional information requested.

On September 26, 1996, shortly before the 60 day suspension was to expire, the learning disability specialist, Lynne Douglas, sent Gina Eustaquio, the Intracorp disability specialist who was managing Vinson's vocational rehabilitation plan, a summary report that contained extensive information regarding Vinson's diagnostic, academic, and behavioral history, his vocational rehabilitation testing, his progress at the college, and his current status. Attached to Douglas's report was a one-page Individualized Education Program Plan for Vinson dated June 12, 1979, showing that he had been placed in full-time learning disability classes in elementary school as a result of "psychological and educational data." Douglas noted that Vinson had been diagnosed with a learning disability early in his schooling, and had been served as a person with a learning disability throughout his education.

Based upon Douglas's report, and considering the accommodations provided to Vinson by the college, Ms. Eustaquio believed a sufficient diagnosis of dyslexia had been made to warrant consideration of reasonable accommodations by the DLIR. Eustaquio telephoned Thomas and read Douglas's report to her. Without seeing the

report, Thomas concluded that it was insufficient because it did not have specific diagnosis and limitation information. In particular, Thomas believed the report did not contain sufficiently specific information regarding "why [Vinson] could not complete more than nine credits at a time in terms of reading, how much could he read per day, and, you know, exactly why couldn't he read more than so much information per day."

Because Vinson had failed to provide what Thomas considered to be sufficient information to support his asserted disability, she instructed Eustaquio to prepare a closure report. Thomas also stated that even if Vinson were to attempt to carry 15 units per semester (which he was willing to try), she would still not approve a rehabilitation plan for him, because he had submitted evidence that due to his asserted dyslexia he could only handle 9 units per semester. Thomas refused any further extensions of time to explore alternatives. Thus, Vinson's case was closed as "not feasible" and his request for State-funded rehabilitation schooling was denied.

Vinson then filed suit under Title II of the ADA and section 504 of the Rehabilitation Act.[5] He alleged that Thomas and the DLIR discriminated against him by denying his request for vocational rehabilitation schooling benefits without making reasonable accommodations for his dyslexia. After Vinson filed his lawsuit, the DLIR

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[5] Vinson also raised a claim under 42 U.S.C. § 1983 for the alleged violation of his procedural and substantive due process rights under the Fourteenth Amendment and a claim under Hawaii Revised Statutes Chapter 386. The district court dismissed these claims, and Vinson does not challenge that dismissal in this appeal.

reopened his case and he was granted vocational rehabilitation benefits, including schooling at his requested pace of study. Vinson, however, continues to seek monetary damages from the DLIR and Thomas for what he alleges to be severe emotional distress suffered as a result of their earlier refusal to approve a rehabilitation plan that would include accommodations for his dyslexia.

The district court granted summary judgment in favor of the DLIR and Thomas. Vinson timely appealed. We have jurisdiction under 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand for further proceedings.

II

We first address the DLIR's contention that it is protected from suit on Vinson's Rehabilitation Act claim by sovereign immunity under the Eleventh Amendment. This argument is foreclosed by our recent decision in *Douglas*. In that case, we reaffirmed, following the Supreme Court's decision in *Board of Trustees v. Garrett,* 531 U.S. 356, 148 L. Ed. 2d 866, 121 S. Ct. 955 (2001), our previous holding in *Clark v. California,* 123 F.3d 1267, 1271 (9th Cir. 1997), that States are subject to suit in federal court under section 504 of the Rehabilitation Act if they accept federal Rehabilitation Act funds. The State of Hawaii accepted federal Rehabilitation Act funds. Therefore, the Eleventh Amendment is not a bar to Vinson's section 504 claim against the DLIR. *See Douglas,* 271 F.3d at 820-21. We turn now to the merits of that claim.

III

We review a grant of summary judgment de novo. *Thornton v. McClatchy Newspapers, Inc.,* 261 F.3d 789,

794 (9th Cir. 2001). Summary judgment is appropriate only if, viewing the evidence in the light most favorable to the nonmoving party, there is no dispute as to any genuine issue of material fact. *Bagdadi v. Nazar,* 84 F.3d 1194, 1197 (9th Cir. 1996).

Vinson argues that the DLIR discriminated against him by refusing to approve (or consider in good faith) a rehabilitation plan that included reasonable accommodations for his dyslexia. He contends he is disabled according to 28 C.F.R. § 35.104 and 29 C.F.R. § 1615.103 as a person with an impairment (dyslexia) which substantially limits the major life activity of learning. The district court did not determine whether Vinson was *disabled* as a result of his dyslexia. Instead, the court determined that the DLIR was entitled to require Vinson to submit a diagnosis of dyslexia from a qualified medical professional, and he had not done so. Because he had not, the district court determined that Vinson had not provided the DLIR with sufficient proof that he suffered from dyslexia, the alleged impairment upon which his claim depended. The district court also determined that Vinson's requested vocational rehabilitation services had been denied for reasons other than his asserted disability.

Whether Vinson met the statutorily defined requirements to establish that he was disabled under the Rehabilitation Act requires a fact specific inquiry into (1) whether he suffered from dyslexia, and if so (2) whether his dyslexia was an impairment [6] under the Act, and if it was (3) whether a major life activity was substantially

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[6] Mental and physical impairments are defined to include "specific learning disabilities." 28 C.F.R. § 35.104.

limited by that impairment. *Bragdon v. Abbott,* 524 U.S. 624, 631, 141 L. Ed. 2d 540, 118 S. Ct. 2196 (1998).[7] Vinson did not provide a medical professional's diagnosis of dyslexia. He did provide, however, a sworn statement from his learning disabilities expert, Barbara Bateman, Ph. D., J.D.,[8] that the DLIR "was not entitled to demand or rely solely upon a 'medical' diagnosis of dyslexia, because dyslexia is diagnosed primarily by behavioral and/or psycho-educational data, as clearly shown in DSM-IV. It can be diagnosed by medical and non-medical personnel alike." Dr. Bateman's statement set forth the following diagnostic criteria for dyslexia from the *Diagnostic and Statistical Manual of Mental Disorders:*

> (A) reading achievement, as measured by individually administered standardized tests of reading accuracy or comprehension, is substantially below that expected given the person's chronological age, measured intelligence; (B) the disturbance in Criterion A significantly interferes with academic achievement or activities of daily living that require reading skills; and (C) if a sensory deficit is present, the reading difficulties are in excess of those usually associated with it.

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[7] We examine cases construing claims under the ADA, as well as section 504 of the Rehabilitation Act, because there is no significant difference in the analysis of rights and obligations created by the two *Acts. Zukle v. Regents of the University of California*, 166 F.3d 1041, 1045 n. 11 (9th Cir. 1999).

[8] The defendants objected to Bateman's declaration based upon a failure to timely disclose her report according to the court's scheduling order. The district court did not rule on the defendants' objections, and did not strike the declaration from the record. Therefore, it is a part of the record before us.

Dr. Bateman reviewed Lynne Douglas's September 26, 1996 letter and found that it contained "more than ample observational and anecdotal data to establish dyslexia." In addition, Vinson provided letters from the college indicating that it had provided accommodation to him because of his long standing history of a learning disability, and that it recognized him as a full-time student with nine credits on account of that disability. He also provided Douglas's September 26, 1996 letter noting his diagnostic and academic history, including his history of receiving accommodation as a person with a disability throughout his schooling, and Douglas's opinion that the accommodations he sought were reasonable.

Vinson also presented evidence that his dyslexia substantially limited a major life activity – learning. *See* 28 C.F.R. § 35.104 (2001) (defining "major life activity" to include learning). He provided:

> A letter from the college indicating that because of his dyslexia he required extra study time;
>
> Douglas's letter citing the GATB and NATB testing data from rehabilitation specialist Barbara Boddy, which Douglas believed demonstrated significant discrepancies between Vinson's performance on the written and non-written tests in the areas of spelling, language, and numerical abilities;
>
> Douglas's letter showing an historical disparity in Vinson's testing data, his need to "read things over several times to comprehend what he is reading," and his need for a substantial amount of extra time to complete exams; and

Excerpts from the Intake Questionnaire completed by Vinson for Douglas, showing significant writing and spelling deficiencies.

Based upon all of the foregoing evidence which was presented to the district court, we conclude genuine issues of material fact exist as to whether Vinson has dyslexia and whether, if he does, his dyslexia is an impairment that substantially limits his ability to learn. Summary judgment was inappropriate on these disability issues. *See Mustafa v. Clark Co. Sch. Dist.*, 157 F.3d 1169, 1175 (9th Cir. 1998) (determining that genuine issue of material fact precluded summary judgment as to whether plaintiff was disabled). We next consider the issue addressed by the district court: Whether Vinson provided to the DLIR sufficient documentation of his disability.

A public agency may require reasonable evidence of a disability before providing accommodations. *See Weinreich v. Los Angeles County Metro. Transp. Auth.*, 114 F.3d 976, 979 (9th Cir. 1997) (public agency may require updated certification of qualifying disability). In refusing Vinson's requested accommodations, the DLIR relied not on the absence of any proof that he was disabled by dyslexia, but on Vinson's failure to provide a certain *kind* of proof of dyslexia. A public agency may not, however, insist on data supporting a claim of disability beyond that which would satisfy a reasonable expert in the field. *CF. Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 674 (1st Cir. 1995) ("Where an applicant requests reasonable accommodation, an employer may request 'documentation from an appropriate professional (e.g., a doctor, rehabilitation counselor, etc.), stating that s/he has a disability.'") (quoting Equal Employment Opportunity Comm'n, *Enforcement Guidance: Preemployment Disability-Related Inquiries and*

Medical Examinations Under the Americans with Disabilities Act of 1990 § IV.B.6.b (EEOC Notice 915.002) (May 19, 1994)). As there was a conflict of material fact on the question of whether a reasonable expert in the field would accept the type of evidence presented by Vinson as proof of his disability, the district court should not have entered summary judgment on that issue.

Because there is a genuine issue of material fact as to whether Vinson is disabled within the meaning of the Rehabilitation Act, and whether he sufficiently demonstrated such disability to the DLIR, the next question we consider is: Assuming Vinson is disabled, did the DLIR fail to provide a reasonable accommodation for his disability? The parties did not raise the reasonable accommodation issue in the district court, and that court did not consider the issue because it concluded Vinson had not submitted to the DLIR sufficient evidence that he was disabled.[9] On remand, however, the district court will encounter the reasonable accommodation issue. Therefore, we address the issue in this opinion.

A failure to provide reasonable accommodation can constitute discrimination under section 504 of the Rehabilitation Act.

> A public entity shall make reasonable modifications in policies, practices, or procedures when

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[9] The district court also determined that Vinson had failed to show that the requested vocational rehabilitation services were denied solely because of his disability. Vinson's claim that the DLIR failed to modify its policies to reasonably accommodate his dyslexia, however, does not require such a showing. *See Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128, 1139 (9th Cir. 2001).

> the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

28 C.F.R. 35.130(b)(7) (2001).

The question whether a particular accommodation is reasonable "depends on the individual circumstances of each case" and "requires a fact-specific, individualized analysis of the disabled individual's circumstances and the accommodations that might allow him to meet the program's standards." *Wong v. Regents of the Univ. of Cal.*, 192 F.3d 807, 818 (9th Cir. 1999). Vinson bore the initial burden of producing evidence that a reasonable accommodation was possible. *Wong,* 192 F.3d at 816-17. Thereafter, the burden shifted to the DLIR to produce rebuttal evidence that the requested accommodation was not reasonable. *Id.* at 817.

If Vinson is disabled, the DLIR also had a duty to engage in an interactive process to consider his requested accommodations. As we have explained in the context of our employment cases, once the need for accommodation has been established, there is a mandatory obligation to engage in an informal interactive process "to clarify what the individual needs and identify the appropriate accommodation." *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1112 (9th Cir. 2000) (quoting *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act,* EEO Compliance Manual (CCH), § 902, No. 915.002 (March 1, 1999), at 5440). This interactive process is triggered upon notification of the disability and the desire for accommodation. *Barnett,* 228 F.3d at 1114. An employer who fails to engage

in such an interactive process in good faith may incur liability "if a reasonable accommodation would have been possible." *Id.* at 1116.

Because the district court determined that Vinson failed to establish that he is disabled, it did not consider whether the DLIR had engaged in an interactive process in good faith, whether Vinson's requested accommodations were reasonable, whether the proposed accommodations would substantially alter the nature of the vocational rehabilitation services provided by the DLIR, or whether Vinson was otherwise qualified to complete the type of vocational rehabilitation plan suggested even with the accommodations.[10] *See Humphrey,* 239 F.3d at 1138-39; *Wong,* 192 F.3d at 816-17. As with the issue of Vinson's disability, the record reflects genuine issues of material fact concerning these additional issues. Thus, summary judgment was inappropriate on Vinson's claims that the DLIR failed to engage in good faith in the required interactive process and failed to reasonably accommodate his disability.

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[10] Vinson also bears the initial burden of demonstrating that, with reasonable accommodations, he is otherwise qualified to participate in the DLIR's vocational rehabilitation services. *Wong*, 192 F.3d at 816-17. The DLIR never disputed that Vinson was "otherwise qualified" to receive vocational rehabilitation services. To the contrary, the record demonstrates that until Thomas insisted that Vinson carry a course load of at least 15 credits per semester, all of the parties proceeded for more than two years on the assumption that Vinson was intellectually and academically capable of completing the community college program so long as he received some accommodation.

IV

In addition to suing the DLIR, Vinson sued Thomas under 42 U.S.C. § 1983, in both her individual and official capacities. The district court determined that neither the DLIR nor Thomas in her official capacity were proper defendants under 42 U.S.C. § 1983. Vinson does not appeal that decision. Therefore, we address only the propriety of Vinson's § 1983 claim against Thomas in her individual capacity. As to that claim, the federal laws Vinson alleges Thomas violated are Title II of the ADA and section 504 of the Rehabilitation Act.[11]

Section 1983 does not confer rights, but instead allows individuals to enforce rights contained in the United States Constitution and defined by federal law. *See Buckley v. City of Redding,* 66 F.3d 188, 190 (9th Cir. 1995). An alleged violation of federal law may not be vindicated under § 1983, however, where: "(1) the statute does not create an enforceable right, privilege, or immunity, or (2) Congress has foreclosed citizen enforcement in the enactment itself, either explicitly, or implicitly by imbuing it with its own comprehensive remedial scheme." *Buckley,* 66 F.3d at 190 (citing *Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 508, 110 L. Ed. 2d 455, 110 S. Ct. 2510 (1990)). "[A] comprehensive remedial scheme for the enforcement of a statutory right creates a presumption that Congress intended to foreclose resort to more general remedial schemes to vindicate that right." *Lollar v. Baker,* 196 F.3d 603, 609 (5th Cir. 1999) (citing *Middlesex Co. Sewerage*

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[11] Vinson's individual capacity claim against Thomas does not implicate the State's sovereign immunity under either the ADA or the Rehabilitation Act.

Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 20, 69 L. Ed. 2d 435, 101 S. Ct. 2615 (1981)).

We have not heretofore considered whether a public official can be sued in his or her individual capacity under 42 U.S.C. § 1983 predicated upon alleged violations of the ADA or the Rehabilitation Act.[12] Other circuits that have addressed this question have held that an individual cannot be sued under section 1983 for violations of Title II of the ADA or section 504 of the Rehabilitation Act.

In *Alsbrook v. City of Maumelle,* 184 F.3d 999 (8th Cir. 1999) (en banc), the Eighth Circuit determined that the comprehensive remedial scheme of Title II of the ADA barred a section 1983 action against defendants in their individual capacities predicated upon a Title II violation. *Id.* at 1011. The Fifth Circuit came to a similar conclusion in a case involving the Rehabilitation Act. In *Lollar,* 196 F.3d at 610, the Fifth Circuit held that that Act "provided a specific comprehensive internal enforcement mechanism to protect the rights of the disabled who are employed by recipients of federal funds" and that "Congress intended to foreclose resort to the more general enforcement provisions of section 1983 to vindicate the rights created by the Rehabilitation Act." *Id.* at 609-610. The Eleventh Circuit, in *Holbrook v. City of Alpharetta,* 112 F.3d 1522 (11th Cir.

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[12] In *Duvall v. County of Kitsap,* 260 F.3d 1124 (9th Cir. 2001) the plaintiff sued the County of Kitsap under the ADA and Rehabilitation Act and under 42 U.S.C. § 1983. We noted: "On appeal, the only issue pertinent to this provision raised by any of the defendants is whether Duvall has shown that the denial of his request for videotext display resulted from a custom or policy of the County." 260 F.3d at 1141. The question whether § 1983 could be used as a mechanism to recover for violation of the ADA or the Rehabilitation Act was not addressed.

1997), applied the same analysis and held that a plaintiff could not "maintain a section 1983 action in lieu of – or in addition to – a Rehabilitation Act or ADA cause of action if the only alleged deprivation is of the employee's rights created by the Rehabilitation Act and the ADA." *Id.* at 1531.

We find the reasoning of our sister circuits persuasive. We therefore join the Fifth, Eighth, and Eleventh Circuits and hold that a plaintiff cannot bring an action under 42 U.S.C. § 1983 against a State official in her individual capacity to vindicate rights created by Title II of the ADA or section 504 of the Rehabilitation Act. Vinson's claim against Thomas in her individual capacity under 42 U.S.C. § 1983 fails.[13]

V

In sum, we conclude that, by accepting federal Rehabilitation Act funds, the DLIR waived its Eleventh Amendment immunity as to Vinson's claim under section 504 of the Rehabilitation Act. That claim, therefore, is not precluded by the DLIR's sovereign immunity. Vinson has raised genuine issues of material fact on the questions whether he was disabled, whether he presented sufficient evidence of his disability to the DLIR, whether the DLIR failed to engage in good faith in the required interactive process, and whether the DLIR wrongfully refused his request for reasonable accommodation. The district court's

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[13] The district court granted summary judgment in favor of Thomas in Vinson's § 1983 action on the ground that she was entitled to qualified immunity. We do not reach the qualified immunity issue.

summary judgment in favor of the DLIR on Vinson's claim under section 504 of the Rehabilitation Act is reversed.

Vinson may not proceed against Thomas in her individual capacity on his claim under 42 U.S.C. § 1983, predicated upon her alleged violation of Title II of the ADA and section 504 of the Rehabilitation Act, because that claim is barred by the comprehensive remedial scheme of those Acts. The district court's summary judgment in favor of Thomas in her individual capacity on that claim is affirmed.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

DISSENT BY:

O'SCANNLAIN

DISSENT:

O'SCANNLAIN, Circuit Judge, dissenting:

I respectfully dissent from Part III of the majority's determination that Brian Vinson's claim of disability discrimination against Hawaii should survive summary judgment. Indeed, if I were writing on a clean slate, I would not even reach the merits of his claim because I believe Hawaii enjoys a constitutionally protected right of sovereign immunity from these suits that was neither waived nor validly abrogated by Congress.

I

For over a century, the Supreme Court has taught us that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States." *Hans v. Louisiana,* 134 U.S. 1, 15, 33 L. Ed. 842, 10 S. Ct. 504 (1890). Indeed, the Eleventh Amendment's "ultimate guarantee" is "that nonconsenting States may not be sued by private individuals in federal court." *Bd. of Trustees of the Univ. of Ala. v. Garrett,* 531 U.S. 356, 363, 148 L. Ed. 2d 866, 121 S. Ct. 955 (2001). We have seen the Supreme Court strike down statutes passed pursuant to Congress's Article I power that purported to abrogate state sovereign immunity, *Seminole Tribe of Fla. v. Fla.,* 517 U.S. 44, 72-73, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996); *see also Alden v. Maine,* 527 U.S. 706, 759-60, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999) (holding that Article I does not permit Congress to subject nonconsenting States to private suits in their own courts), limit the reach of Congress's power to enforce against the States the rights guaranteed by the Fourteenth Amendment, *Garrett,* 531 U.S. at 374 (holding Title I of the ADA did not validly abrogate sovereign immunity); *Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 91, 145 L. Ed. 2d 522, 120 S. Ct. 631 (2000) (holding that the Age Discrimination in Employment Act did not validly abrogate sovereign immunity); *United States v. Morrison,* 529 U.S. 598, 625-26, 146 L. Ed. 2d 658, 120 S. Ct. 1740 (2000) (holding that Congress lacked the authority to create the civil remedy provision of the Violence Against Women Act), and allow States to participate in a field subject to congressional regulation without waiving their constitutionally guaranteed sovereign immunity, *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 627 at

666, 680, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999). It cannot be more clear that the States retain "a residuary and inviolable sovereignty. They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty." *Alden,* 527 U.S. at 715 (internal citation and quotations marks omitted).

A

I recognize, however, that we have recently reaffirmed that by accepting federal funds under the Rehabilitation Act, 29 U.S.C. § 794, a State waives its sovereign immunity from suits by individuals in federal court. *Douglas v. Cal. Dep't of Youth Auth.,* 271 F.3d 812, *as amended,* 271 F.3d 910 (9th Cir. 2001); *see also Armstrong v. Davis,* 275 F.3d 849, 878 (9th Cir. 2001); *Clark v. Cal.,* 123 F.3d 1267 (9th Cir. 1997). My dissent from the order denying *Douglas* en banc rehearing fully explains my disagreement with our approach to the question of sovereign immunity waiver. *Douglas v. Cal. Dep't of Youth Auth.,* 2002 U.S. App. LEXIS 6779, No. 99-17140, 2002 WL 538806 (9th Cir. April 12, 2002) (O'Scannlain, J., dissenting); *see also Garcia v. S.U.N.Y. Health Sciences Ctr.,* 280 F.3d 98 (2d Cir. 2001). I will not belabor the point here, but reluctantly acquiesce in Part II of the opinion.

B

Vinson waived reliance on Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.,* at oral argument. While I agree that this was a wise choice considering the clear holding and import of *Garrett,* 531 U.S. at 374 (holding Title I of the ADA did not validly

abrogate state sovereign immunity),[1] we have recently upheld Title II as a valid abrogation of state sovereign immunity. *Hason v. Med. Bd. of Cal.*, 279 F.3d 1167, 1171 (9th Cir. 2002); *see also Dare v. Cal.*, 191 F.3d 1167, 1175 (9th Cir. 1999), *cert. denied,* 531 U.S. 1190, 149 L. Ed. 2d 103, 121 S. Ct. 1187 (2001).

Since Title II is no longer an issue in Vinson's appeal, I simply note that *Hason's* holding conflicts with no fewer than five of our sister circuits who have reconsidered the issue in light of *Garrett. See Reickenbacker v. Foster,* 274 F.3d 974, 983 (5th Cir. 2001); *Thompson v. Colorado,* 278 F.3d 1020, 1034 (10th Cir. 2001), *petition for cert. filed,* 70 U.S.L.W. 3464 (U.S. Jan. 7, 2002) (No. 01-1024); *Erickson v. Bd. of Governors of State Colleges and Univ.,* 207 F.3d 945, 948 (7th Cir. 2000) (questioning the continued authority of *Crawford v. Ind. Dep't of Corrections,* 115 F.3d 481, 487 (7th Cir. 1997), which upheld Title II as a valid abrogation of state sovereign immunity), *cert. denied,* 531 U.S. 1190 (2001); *Alsbrook v. City of Maumelle,* 184 F.3d 999, 1009-10 (8th Cir. 1999) (en banc); *cf. Brown v. N.C. DMV,* 166 F.3d 698, 707 (4th Cir. 1999) (holding regulation enacted pursuant to Title II did not validly abrogate state sovereign immunity); *but see Garcia,* 280 F.3d at 111-12 (holding that Title II actions may be brought against States if the plaintiff can establish that the "violation was motivated by discriminatory animus or ill will based on the plaintiff's disability"); *but cf. Popovich v. Cuyahoga County Court of Common Pleas,* 276 F.3d 808, 812, 815

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[1] Title I prohibits employment discrimination against qualified individuals on the basis of their disability, 42 U.S.C. § 12112, and Title II prohibits discrimination in the provision of public services and programs, 42 U.S.C. § 12132.

(6th Cir. 2002) (en banc) (agreeing that Title II is *not* a valid abrogation of sovereign immunity when Congress is enforcing the Equal Protection Clause, but holding it *is* permissible when enforcing the Due Process Clause).[2]

II

Of course, if Hawaii's sovereign immunity prevents it from being haled into federal court for an alleged violation of the ADA or Rehabilitation Act, we would have no occasion to reach the merits of Vinson's claim. Accepting the majority's recital of our current law of sovereign immunity in Part II, however, the majority still errs in Part III by reversing the district court's grant of summary judgment.

A

To qualify as a disabled individual under the Rehabilitation Act, Vinson must establish that he has an impairment that substantially limits at least one of his major life activities. 42 U.S.C. § 12102(2); 29 U.S.C. § 791(g).[3] Certainly dyslexia can constitute an "impairment," 29 C.F.R. § 1630.2(h)(2) (defining impairment to include "specific learning disabilities"); however, I am not persuaded that Vinson presented evidence sufficient to survive summary

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[2] Garrett's reasoning regarding the ADA undoubtedly invalidates the Rehabilitation Act's attempt to abrogate sovereign immunity as well. *See Reickenbacker*, 274 F.3d at 983 ("Since the two statutes offer virtually identical protections, the abrogation analysis is the same."); *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999).

[3] Vinson does not argue that he has either a record of an impairment or was regarded as having an impairment.

judgment on whether he had an impairment – particularly one that substantially limited a major life activity.

While interpretative regulations include "learning" as a major life activity, 29 C.F.R. § 1630.2(i),[4] Vinson must demonstrate that his dyslexia *substantially limits* his ability to learn. The phrase "substantially limits" requires that "a person be *presently* – not potentially or hypothetically – substantially limited in order to demonstrate a disability." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482, 144 L. Ed. 2d 450, 119 S. Ct. 2139 (1999) (emphasis added). This is an individualized inquiry. 527 U.S. at 483. More specifically, "substantially limited" refers to the inability to perform a major life activity as compared to the average person in the general population, or a significant restriction as to the condition, manner, or duration under which an individual can perform the particular activity. *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 151 L. Ed. 2d 615, 122 S. Ct. 681, 690 (2002) (citing 29 C.F.R. § 1630.2(j)).

In short, dyslexia does not render an individual disabled per se for purposes of the Rehabilitation Act.

B

It is not enough for Vinson to establish post hoc that he has an impairment that substantially limits the major

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[4] Because Congress gave no agency the authority to issue regulations implementing generally applicable provisions of the ADA – particularly the authority to interpret the term "disability," 42 U.S.C. § 12102(2), the existing regulations are not entitled to any special deference. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 479, 144 L. Ed. 2d 450, 119 S. Ct. 2139 (1999).

life activity of learning. Rather, because his suit is based upon the Department of Labor and Industrial Relations's ("the Department") initial failure to accommodate his disability, he must establish that he presented sufficient proof of his disability to the Department. Indeed, a public entity does not violate the law by refusing to accommodate individuals who cannot establish that they have disability that qualifies them for an accommodation.

Thus, it is important to focus on the information that the Department – particularly Alice Thomas, Director of the Vocational Rehabilitation Branch – had *at the time* it decided to close Vinson's file in October 1996. For that reason, the sworn statement of Vinson's learning disabilities expert, Barbara Bateman, cited by the majority, *supra* at 6481, is immaterial to the question of what the Department knew; she prepared her statement well after the department closed Vinson's file. The Department did have a September 26, 1996 letter from C. Lynne Douglas, a learning disability specialist, that Vinson argues is the definitive letter that should have satisfied the Department that his dyslexia substantially limited his ability to learn.

However, Douglas herself admitted that her letter was not meant to be a diagnostic report. When asked in her deposition whether her letter was a "diagnosis of a learning disability," she replied, "It was not, and it was never intended to be one." Indeed, she did not complete her diagnostic tests until February 1997, months after Vinson's file had been closed. Later in her deposition, Douglas testified that her report was not intended to meet the "diagnostic criteria outlined in [her own] attached guidelines." However, she asserted that "most specialists in the field" would, "without a doubt," believe that her letter demonstrated "overwhelming and convincing evidence

that [Vinson] *would or did have a diagnosis of dyslexia.*" (emphasis added).

How can an assertion that Vinson *would have* a diagnosis of dyslexia – if he ever was diagnosed – constitute sufficient evidence of a disability? Second, even if a specialist might be able to decipher from Douglas's 19 page letter that Vinson had a diagnosis of dyslexia, it is unreasonable to ask an untrained person to connect those same dots. Vinson's own expert witness, Bateman, accused Thomas of lacking "the knowledge or expertise to determine whether or not" Douglas's letter established that Vinson had a disability. I agree, which makes it all the more important that Vinson submit a specialist's *actual diagnosis*. If, in fact, a specialist could have made the diagnosis, she should have. Then, Vinson should have submitted that diagnosis to the Department.

Vinson argues that the Department was requesting information that did not exist. However, Douglas herself eventually did complete diagnostic tests, and she also asserted that a specialist could have diagnosed Vinson's dyslexia from her November 1996 letter. Indeed, a specialist in connection with this litigation – namely, Bateman – did in fact review Douglas's letter and conclude that Vinson was dyslexic. This is precisely the information the Department sought, and Douglas's and Bateman's own sworn statements prove that it was readily available.

While acknowledging that the Department is entitled to ask an individual for more information regarding his disability, *Weinreich v. Los Angeles County Metro. Transp. Auth.*, 114 F.3d 976, 979 (9th Cir. 1997), the court holds that a public agency cannot request information beyond that which would satisfy a reasonable expert in the field,

supra at 6482. This seems reasonable enough, *see Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 674 (1st Cir. 1995) ("When an applicant requests reasonable accommodation, an employer may request documentation from an appropriate professional (e.g., a doctor, rehabilitation counselor, etc.), stating that s/he has a disability.") (quotation marks omitted), but I do not agree that the Department was making an unreasonable demand of Vinson. Not only must Vinson supply evidence showing that he is dyslexic, he must also show how that impairment currently limits a major life activity. As detailed above, apparently such a diagnosis was obtainable, and it is unrealistic to require Thomas, who is not a learning disabilities specialist, to glean a diagnosis from Douglas's letter and how that diagnosis might substantially limit Vinson's present ability to learn.

Denying public agencies who provide important, but finite, services the ability to request specific documentary support of an individual's disability risks creating a system ripe for abuse. Therefore, I cannot fault the Department for seeking an actual diagnosis of dyslexia before the State expended funds on Vinson's behalf.

C

In any event, even if Vinson had established that he is disabled, he must show that the Department closed his file solely because of his disability. *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1045 (9th Cir. 1999). This is well-established law. *E.g., Wong v. Regents of the Univ. of Cal.*, 192 F.3d 807, 816 (9th Cir. 1999). Thus, the majority's assertion that the district court erred by requiring Vinson to show that his file was closed because he was

disabled befuddles me, *supra* at 6483 n.9. The Department asserted three non-discriminatory reasons for closing his file: (1) Gina Eustaquio, Senior Rehabilitative Specialist at Intracorp and Vinson's counselor, no longer had his trust; [5] (2) Vinson demonstrated proficiency in obtaining schooling and employment on his own; and (3) he evinced a preference to rely on resources and individuals outside the program. I would add one more: Vinson failed to produce adequate information regarding his impairment.

In *Zukle,* we applied the familiar burden-shifting analysis of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), to the disability discrimination context. *Zukle,* 166 F.3d at 1047; *see also Snead v. Metro. Prop. & Cas. Ins.,* 237 F.3d 1080, 1092-93 (9th Cir. 2001); *Mustafa v. Clark County Sch. Dist.,* 157 F.3d 1169, 1175-76 (9th Cir. 1998). After the Department puts forth legitimate, non-discriminatory reasons for closing Vinson's file, he must demonstrate that the Department's proffered reasons were a pretext for disability discrimination. *See Snead,* 237 F.3d at 1093.

In *Weinreich,* we held that Los Angeles's transit system did not discriminate on the basis of disability by requiring updated certification of a rider's disability before he qualified for its *Reduced Fare Program*. 114 F.3d at 979. The transit system denied plaintiff access to the program because he could not submit an update due to financial limitations. We held that this denial was due not to his medical disability, but rather due to his own failure to

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[5] This was demonstrated by the fact that Eustaquio requested no fewer than four times that Vinson sign a release allowing his high school records to be sent to her; he refused each time.

satisfy a condition of eligibility. *Id.* I see little to distinguish this case from *Weinreich.* Here, Vinson was not denied a reduced course load because of his disability, rather, it was due to his failure to provide a specialist's diagnosis of dyslexia. Furthermore, like *Weinreich,* the Department's criteria were valid; there is no evidence that the Department made unreasonable demands with the discriminatory purpose to screen out disabled individuals from its programs.

Thus, I agree with the district court that even if Vinson established his disability, he failed to show that the Department closed his file because of it.

III

I cannot agree that the district court erred by granting summary judgment on Vinson's disability discrimination claim. Despite the opportunity and repeated requests for clarification, Vinson did not submit a clear diagnosis of dyslexia. Of course, if our caselaw were consistent with the Supreme Court's teachings, the merits of Vinson's claim would present a question without need of an answer because the constitutional sovereignty and dignity Hawaii enjoys as a State would bar Vinson's suit against it.

I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

BRIAN VINSON, Plaintiff, vs. ALICE THOMAS, individually and in her capacity as the Director of the Vocational Rehabilitation Branch of the Department of Labor and Industrial Relations, State of Hawaii; DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, STATE OF HAWAII; INTRACORP, a duly organized and incorporated Delaware corporation, Defendants.	CIVIL NO. 97-00091 HG **ORDER GRANTING DEFENDANTS ALICE THOMAS AND THE DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS' MOTION FOR SUMMARY JUDGMENT FILED ON NOVEMBER 12, 1999** (Filed Feb. 28, 2000)

ORDER GRANTING DEFENDANTS ALICE THOMAS AND THE DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS' MOTION FOR SUMMARY JUDGMENT FILED ON NOVEMBER 12, 1999

Defendants Alice Thomas ("Thomas") and the Department of Labor and Industrial Relations ("DLIR", together with Thomas, the "Defendants") seek summary judgment of Plaintiff Brian Vinson's ("Plaintiff") claims that Defendants violated Plaintiff's rights under the Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act and Chapter 368 of the Hawaii Revised Statutes by refusing to modify his vocational

rehabilitation plan to accommodate his alleged dyslexia by permitting him to take a reduced course load and that Defendants violated Plaintiff's right to due process under the Fourteenth Amendment of the Constitution by denying him a hearing prior to the termination of his vocational rehabilitation benefits.

Defendants' Motion asserts that Thomas is entitled to qualified immunity from Plaintiff's claims, that the ADA and Rehabilitation Act do not permit liability against Thomas, that DLIR is immune from suit under the Eleventh Amendment for claims seeking money damages and those claims based on state law and that, even if Thomas and DLIR are not immune from suit, Plaintiff has no evidence to support his claims based on the ADA and Rehabilitation Act because he never demonstrated that he was disabled.

PROCEDURAL HISTORY

On January 27, 1997, Plaintiff filed a Complaint with this Court against Thomas, individually and in her capacity as the Vocational Rehabilitation Unit Supervisor of the State of Hawaii's DLIR, and Intracorp, a Delaware corporation ("Intracorp").[1] Plaintiff's Complaint alleged:

> (1) that DLIR and Thomas discriminated against Plaintiff in violation of Title II of the Americans with Disabilities Act of 1990 ("ADA") by denying Plaintiff access to a vocational rehabilitation plan accommodating Plaintiff's alleged disability and by allegedly mistreating Plaintiff

[1] On December 19, 1997, the parties filed a stipulation of dismissal as to all claims against Defendant Intracorp.

due to his disability during the period in which Plaintiff was seeking vocational rehabilitation services;

(2) that Intracorp discriminated against Plaintiff in violation of Title III of the ADA by wrongfully retaliating against Plaintiff when Plaintiff failed to provide records of his alleged disability and by not accommodating Plaintiff's alleged disability during the course of the provision of Plaintiff's vocational rehabilitation services;

(3) that DLIR's actions constituted a violation of the rights of Plaintiff under the Rehabilitation Act of 1973;

(4) that DLIR and Thomas violated Plaintiff's procedural due process rights under the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983 by not reconsidering the decision to terminate Plaintiff's VR Program and by not providing a hearing for Plaintiff after the termination of Plaintiff's VR Program;

(5) that Defendants violated the rights of Plaintiff secured under Chapter 368 of the Hawaii Revised Statutes;

(6) that Thomas acted maliciously and/or intentionally, willfully, wantonly and/or with reckless disregard to Plaintiff's rights under the ADA, Rehabilitation Act and Chapter 368 of the Hawaii Revised Statutes, and thus is subject to punitive damages.

On January 27, 1997, Plaintiff also filed a Motion for a Preliminary Injunction and a Memorandum in Support of Plaintiff's Motion. Thomas and DLIR filed a memorandum in opposition to Plaintiff's Motion on February 13, 1997.

Plaintiff's Motion for a Preliminary Injunction specifically requested that this Court order:

> (1) that Thomas violated Plaintiff's Fourteenth Amendment due process rights by not giving him a pre-termination hearing required by Hawaii law;
>
> (2) that DLIR and Thomas violated his rights guaranteed by the Americans with Disabilities Act ("ADA") and the Rehabilitation Act;
>
> (3) that Plaintiff's vocational rehabilitation case be reopened and his benefits be reinstated, including back benefits; and
>
> (4) that Defendants must allow accommodations for Plaintiff's dyslexia by approving a plan providing for nine credits per semester and a computer (with software), and by reimbursing him for his out-of-pocket educational costs to date which would otherwise have been provided for under the plan.

(Plaintiff's Motion at 1-2).

On April 9, 1997, this court issued its Amended Order Granting in Part and Denying in Part Plaintiff's Motion for Preliminary Injunction (the "April 9, 1997 Amended Order"). The April 9, 1997 Amended Order denied Plaintiff's first claim that Defendant Thomas violated the Fourteenth Amendment of the United States Constitution by not affording Plaintiff a hearing prior to the termination of his vocational rehabilitation benefits. Relying on *Mathews v. Eldridge,* 424 U.S. 319 (1976), this Court held that Hawaii's provision of a post-termination hearing under Hawaii Administrative Rules ("H.A.R.") § 12-14-

48(c) satisfied the due process requirements of the Fourteenth Amendment.

The April 9, 1997 Amended Order granted Plaintiff's claim that DLIR had failed to conduct a self-evaluation plan under the ADA pursuant to 28 C.F.R. § 35.105. Under 28 C.F.R. § 35.150(d), such a plan was required to be completed nearly four years prior to the April 9, 1997 Amended Order. The Court ordered DLIR to conduct a self-evaluation and to provide an opportunity for all interested persons to participate by submitting comments and suggestions. The Court held numerous status conferences to supervise DLIR's compliance with the April 9, 1997 Amended Order over a period of two years. On July 2, 1999, the Court concluded that DLIR had complied with 28 C.F.R. § 35.105 and lifted the injunction by entering the Order Lifting Preliminary Injunction Granted in the Court's Amended Order Granting in Part and Denying in Part Plaintiff's Motion for Preliminary Injunction Filed on April 9, 1997.

The remaining claims in Plaintiff's Motion for Preliminary Injunction were stayed until Plaintiff had exhausted his administrative remedies. Plaintiff requested that this Court issue a declaratory order that Defendants discriminated against Plaintiff on the basis of his disability in violation of the ADA and Rehabilitation Act, that this court reopen and approve Plaintiff's vocational plan and that the state be ordered to accommodate Plaintiff's disability. Each of these requests were found to be premature. This Court held that the state should be afforded the opportunity through its administrative processes to make a final administrative decision as to the validity of Plaintiff's disability and the state's response to it. As the Court held:

> The administrative record and the record here are unclear as to whether Plaintiff sufficiently established his dyslexia by providing adequate medical documentation thereof to State Defendants, which is a prerequisite to entitlement to any reasonable accommodations. The Court also finds that the administrative record is not fully developed as to the reasons behind Plaintiff's termination from the program .... Moreover, State Defendants' decision to terminate Plaintiff's rehabilitation plan is not final. Administrative procedures are pending which could result in a reversal of the current decision.

(April 9, 1997 Amended Order at 16-17).

On November 12, 1999, Thomas and DLIR filed Defendants' Motion. Plaintiff responded on December 30, 1999 by filing an Opposition to Defendants' Motion for Summary Judgment and a Responsive Separate Concise Statement of Facts ("Plaintiff's Opposition"). On January 7, 2000, Defendants filed their Reply to Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment and Responsive Separate Concise Statement of Facts ("Defendants' Reply"). A hearing on Defendants' Motion was held on January 18, 2000.

BACKGROUND

On August 18, 1993, Plaintiff injured his back and neck while working at his job at a flooring company, leaving him unable to continue to work at this job. He applied for and was granted worker's compensation benefits. Plaintiff also was referred to the Vocational Rehabilitation Branch, Disability Compensation Division of the State of Hawaii, of which Thomas is the supervisor.

Plaintiff was assigned to Intracorp, a private contractor that managed the vocational rehabilitation ("VR") counseling ("VR Program" or "VR Benefits") for Plaintiff's worker's compensation case for Island Insurance Company.

In order to receive vocational rehabilitation benefits, on February 23, 1994, Plaintiff signed a "Statement of Worker's Rights and Responsibilities." (Exh. K to Defendants' Motion). This Statement provides, in pertinent part:

> Vocational rehabilitation is voluntary and is designed to return you to employment. Your employer must either provide the service or refer you to a mutually agreed upon certified rehabilitation provider to help you return to employment.
>
> [DLIR] has informed the provider that the department believes in early intervention to assist you in obtaining and maintaining suitable gainful employment (job) as soon as practicable. The job must take into consideration your physical and functional limitations and employment handicaps. The job should as closely as possible compare to the job on which you were injured, in pay, benefits, employment status, level of responsibility and education.
>
> Based on the current labor market at time of placement, the provider must follow these steps in this order in helping you to return to work with or without modifications:
>
> (1) the same job with the same employer,
>
> (2) a different job with the same employer,

> (3) the same or a different job with a different employer,
>
> (4) retraining (on-the-job experience, on-the-job training or formal schooling)
>
> The provider's job is to assist you throughout the rehabilitation five-step program of evaluation, planning, provision, placement, and follow-up, as you try to identify, find and hold a job. The assistance will include an explanation of services to be provided and the provider's and your responsibilities.
>
> If you accept vocational rehabilitation services, you must ACTIVELY participate in the vocational rehabilitation process. This includes deciding as soon as possible what kind of job is best suited to you, developing a rehabilitation plan, and obtaining and maintaining the job . . . .

(*Id.*).

As a result of Plaintiff's injuries, it was decided that he could not return to his former job as a floor installer or a different job with his same employer. Plaintiff spent the next two years attending community college classes in order to complete certain courses as part of his retraining. During this time period, there was no vocational rehabilitation plan in effect for Plaintiff. Plaintiff blames this delay on Defendant Thomas's insistence on Plaintiff carrying a 15-credit class load despite his alleged dyslexia. (Pl.'s Opp., Exh. 1 at 53-54, 61).

During the process of completing a vocational plan for Plaintiff's retraining and reentry into the workforce, Plaintiff requested that, on account of his dyslexia, he be allowed to submit a vocational plan that would permit him

to take only 9 credits per semester instead of the 15 credits required, and that he be provided with a computer and software to accommodate his dyslexia. On July 12, 1996, Thomas wrote to Plaintiff's worker's compensation attorney, David Robinson, and gave him ten days to submit "any and all medical information (to include but not limited to diagnoses and limitations) regarding [Plaintiff's] unrelated disability you wish considered in the development and evaluation of his plan." (Exh. O to Defendants' Motion).

In response to this letter, Robinson wrote a letter to Thomas dated July 25, 1996 enclosing letters from learning specialists and educators about Plaintiff's condition as well as general information on dyslexia. (Exh. P to Defendants' Motion). Defendants maintain that Plaintiff provided inadequate documentation of his alleged dyslexia and limitations.

Thomas again wrote Robinson on July 26, 1996 clarifying her request for documentation and specifically asking for:

> 1. Verifiable, medical/psychological evidence establishing a disability exists (diagnosis, test scores, etc.,)
>
> 2. Specific physical/psychological limitations (medically established) experienced by *your claimant,*
>
> 3. the credentials and reports of the experts referred to in your previous correspondence who, based on said limitations, identified appropriate accommodations.

(Exhibit Q to Defendants' Motion).

Robinson responded to Thomas in a letter dated July 30, 1996, indicating that he never thought there was a question as to Plaintiff's dyslexia because both Plaintiff and the learning disability experts at his college "know" he has dyslexia, and that if that was not good enough for Thomas it would be up to Intracorp to determine the appropriate extent of accommodations required for Plaintiff's disability and that he should not have to do so at his own expense. (Exh. R to Defendants' Motion).

On August 2, 1996, Thomas responded to Robinson indicating that her office would be able to consider reasonable accommodations for Plaintiff's alleged disability only after it had received sufficient medical evidence indicating that he was in fact disabled. (Exh. T to Defendants' Motion). Thomas's letter also indicated that Plaintiff's case was being put into suspended/interrupted status to allow Plaintiff the opportunity to submit the proper documentation of his disability, and that suspension would end in 60 days or upon receipt of the requested information.

On August 15, 1996, Plaintiff's VR counselor from Intracorp, Gina Eustaquio ("Eustaquio"), asked Plaintiff to confirm his dyslexia by having his high school records concerning testing and diagnostic information about his condition sent directly to Intracorp. (Exh. U to Defendants' Motion). Eustaquio asked Plaintiff to sign a release, permitting Intracorp limited access to any of Plaintiff's testing and diagnostic records from high school. (*Id.*).

Plaintiff declined to sign a release. (Exh. V to Defendants' Motion at 2-3). Instead, Plaintiff submitted his records to Carol Lynne Douglas ("Douglas"), a learning disability specialist and Coordinator of the Program for

Adult Achievement at Leeward Community College. (*Id.* at 4).

On September 26, 1996, Douglas wrote a letter to Thomas summarizing Plaintiff's academic records and stating that she was in the process of evaluating Plaintiff's conditions and needs. (Exh. W to Defendants' Motion). At the time of the letter, Douglas had not diagnosed Plaintiff. (Exh. D at 95-98 to Defendants' Motion). Douglas did not finish testing Plaintiff until February 3, 1997 and her diagnostic report was not issued until May 12, 1997. (*Id.*).

On October 3, 1996, Eustaquio recommended closure of Plaintiff's VR Program file because Plaintiff's self-sufficiency demonstrated that he no longer needed VR services. (Exh. V to Defendants' Motion).

On October 18, 1996, Thomas sent a letter to Plaintiff confirming that his case was being closed as "not feasible" effective October 17, 1996. (Exh. Y to Defendants' Motion). The closing report drafted by Plaintiff's Intracorp counselor states:

> Adjustment to disability and vocational independence are the two needs program services seek to impact so that injured workers may return to the workforce as functional and independent individuals. This claimant has accommodated his disability, as evidenced by his engagement in future-oriented, goal-focused activity, undeterred by his injury. He has demonstrated not only his ability, but his preference, to utilize resources and individuals outside of this program to assist him in attaining vocational independence.

> Based on the foregoing, case closure as "non-feasibility, no services needed," is being recommended.

(Exh. X to Defendants' Motion).

On October 24, 1996, Robinson drafted a letter to Thomas asking for a reconsideration of her ruling and/or a hearing on the matter pursuant to H.A.R. § 12-14-48. (Exh. Z to Defendants' Motion). The letter also stated that, in accordance with Robinson's previous indications to Thomas, in the event that she refused to accommodate his condition, Plaintiff would proceed with the vocational rehabilitation plan as approved and do his best without the requested accommodations. (*Id.*). Apparently, State Defendants did not respond to this request until February 13, 1997, at which time Plaintiff was notified that the original decision to terminate Plaintiff's case would stand. (Exh. AA to Defendants' Motion).

During this period, Plaintiff continued to receive temporary total disability benefits payments through the insurance company. (Defendants' Reply, Aff. of Melba Manuel at ¶ 4). The insurance carrier never stopped, suspended or reduced its weekly payments to Plaintiff since their inception on September 21, 1993. (*Id.* at ¶ 5). From the Spring of 1995, the insurance carrier agreed to pay Plaintiff's community college tuition, books and supplies until Fall 1999. (*Id.* at ¶ 6).

On February 21, 1997, Plaintiff requested a hearing regarding the closure of Plaintiff's VR Program file. (Exh. BB to Defendants' Motion). On March 20, 1997, the DLIR held a hearing pursuant to Plaintiff's request. (Exh. CC to Defendants' Motion). Since Plaintiff's request that his VR Program file be reopened was not opposed, the Director

determined that Plaintiff was entitled to further VR services. (*Id.*).

Neither party has provided the Court with any evidence as to Plaintiff's current status with the VR Program. The March 20, 1997 decision by the DLIR reinstating Plaintiff's VR Benefits is the last action regarding Plaintiff's status of which the Court has been made aware. (*Id.*).

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party has the initial burden of "identifying for the court the portions of the materials on file [in the case] that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986)). If the moving party meets its burden, then the opposing party may not defeat a motion for summary judgment in the absence of any significant probative evidence tending to support its legal theory. *Commodity Futures Trading Comm'n v. Savage,* 611 F.2d 270, 282 (9th Cir. 1979). The opposing party cannot stand on its pleadings, nor can it simply assert that it will be able to discredit the movant's evidence at trial. *See T.W. Elec. Serv.,* 809 F.2d at 630; Fed. R. Civ. P. 56(e). In a motion for summary judgment, the court must view the facts in the light most favorable to the non-moving party. *State Farm Fire & Casualty Co. v. Martin,* 872 F.2d 319, 320 (9th Cir. 1989).

ANALYSIS

Defendants Alice Thomas and the Department of Labor and Industrial Relations move for summary judgment of Plaintiff's claims based on the arguments that:

(1) Thomas may not be sued in her individual capacity under the ADA or Rehabilitation Act because these acts apply only to "entities" or "programs and activities";

(2) Plaintiff has no valid ADA claim against Thomas or DLIR because he never established the existence of an "impairment" or "disability";

(3) Procedural due process was satisfied when Defendants provided Plaintiff with a hearing in which Plaintiff's VR program was reopened;

(4) Thomas and DLIR are not proper defendants under 42 U.S.C. § 1983;

(5) Plaintiff may not assert a Section 1983 claim against Thomas because she violated no "clearly established right";

(6) Thomas is immune from damage suits under the doctrine of qualified immunity;

(7) DLIR is immune from suit under Chapter 368 of the Hawaii Revised Statutes under the Eleventh Amendment to the U.S. Constitution.

I. Defendant Alice Thomas is not a proper defendant

Defendants argue that Alice Thomas is immune from suit based on the doctrine of qualified immunity and that the ADA and Rehabilitation Act do not apply to Thomas in

her individual capacity. The Court agrees that Thomas is immune from suit. Further, the Court agrees that Title II of the ADA and Section 506 of the Rehabilitation Act do not impose liability on persons in their individual capacities. Therefore, the Court GRANTS summary judgment as to all claims against Thomas in her individual capacity.

A. Thomas is immune from suit under the doctrine of qualified immunity.

Under the doctrine of qualified immunity, government officials performing discretionary functions are immune from damage liability if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). *See also Johnson v. Fankell,* 520 U.S. 911, 914-915 (1997). The Supreme Court adopted this objective test as a means to resolve frivolous complaints at an early stage in the litigation. *See id.; Harlow,* 457 U.S. at 818. If the plaintiff fails to allege a violation of clearly established law or when there is not a material issue of fact regarding whether the defendants committed a violation, defendants are immune from suit as well as liability. *See Johnson,* 520 U.S. at 915.

To determine whether a defendant is entitled to the defense of qualified immunity, a court must (1) identify the right allegedly violated; (2) determine whether the right was clearly established at the time of the violation; and (3) decide whether a reasonable official would have believed the at-issue conduct did not violate the identified right. *See Jensen v. City of Oxnard,* 145 F.3d 1078, 1085 (9th Cir. 1998); *Knox v. Southwest Airlines,* 124 F.3d 1103, 1107 (9th Cir. 1997).

A particular right is "clearly established" if "the contours of [that] right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). To demonstrate a clearly established right, a Plaintiff must show that the only reasonable conclusion, based on prior law, was that the right existed. *See Blueford v. Prunty,* 108 F.3d 251, 255 (9th Cir. 1997).

The determination of whether a right was "clearly established" at a particular time is a pure question of law. *See Elder v. Holloway,* 510 U.S. 510, 516 (1994); *Jensen,* 145 F.3d at 1087.

1. Thomas is entitled to qualified immunity for claims based on Title II of the ADA

Defendants demonstrate that Thomas's closure of Plaintiff's VR Program file was an exercise of discretion, permitted by her position as the VR Unit Supervisor. Because the rights allegedly violated by Thomas's actions were not clearly established, Thomas is entitled to qualified immunity from Plaintiff's ADA claims against her.

Plaintiff claims Thomas violated his right to have accommodations made to his VR Program upon presentation to Thomas of evidence of his alleged dyslexia. Defendants argue that Plaintiff cannot claim that such a right is clearly established. As discussed *infra* at Section II.A., the law is clear that the state is not obligated to accommodate an allegedly disabled person before being provided with sufficient documentation that such a disability exists. The caselaw, however, is unclear what amount of documentation will satisfy Plaintiff's burden of providing such

documentation and thus obligating the State to make reasonable accommodations. The only case [2] coming to this Court's attention to specify what quantum of evidence of a plaintiff's disability will require a state to make reasonable accommodations is *Argen v. New York State Bd. of Law Examiners,* 860 F. Supp. 84 (W.D.N.Y. 1994). The *Argen* court declared that the "plaintiff has the burden of proving by the preponderance of the evidence that he suffers from a 'specific learning disability'" *Id.* at 87; *see also Dubois v. Alderson-Broaddus College,* 950 F. Supp. 754, 758 (N.D. W.Va. 1997) (adopting the *Argen* rule placing the burden on plaintiff to demonstrate to defendant a disability by a preponderance of the evidence); *Kaltenberger v. Ohio College of Podiatric Medicine,* 162 F.3d 432 (6th Cir. 1998) (holding that State had no obligation to offer accommodations after being told by plaintiff that she thought she might have adult attention deficit disorder).

Neither this district nor the Ninth Circuit Court of Appeals has spoken on what quantum of evidence will

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[2] Plaintiff cites two cases to suggest that the State need only be aware of a disability before being obligated to reasonably accommodate that individual. In *Meekison v. Voinovich*, 17 F. Supp. 2d 725, 728 (S.D. Oh. 1998), the court addressed whether there existed facts sufficient to survive a summary judgment motion brought by defendants that the State was aware of plaintiff's dyslexia. The *Meekison* court did not address what amount of proof would demonstrate the State's awareness. Similarly, *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1382-83 (3rd Cir. 1991) permitted plaintiff's claim to survive summary judgment because a genuine issue existed as to whether defendant knew plaintiff was disabled. Neither *Meekison* nor *Nathanson* addressed *when* a defendant will be deemed to be aware of a disability, only that plaintiff could factually dispute whether the State was aware.

satisfy a claimant's burden of demonstrating the existence of a disability. Only when this burden is satisfied will a public entity be obligated to accommodate a disabled individual. Thomas did not have a definite guideline, in her position as the VR Unit Specialist, to evaluate whether Plaintiff had sufficiently proven his disability. There is no ruling in this jurisdiction that would require Thomas to accept the quantum of evidence offered by Plaintiff as sufficient to prove a disability. The law is therefore is not clearly established. If the controlling law is not clearly established, a reasonable person would not be expected to know how to structure his conduct in order to avoid liability. *See Romero v. Kitsap County,* 931 F.2d 624, 628 (9th Cir. 1991). Thus, as to Plaintiff's claims against Thomas based on the ADA, Thomas is entitled to qualified immunity.

2. Thomas is entitled to qualified immunity for claims based on Section 504 of the Rehabilitation Act

For the same reasons discussed *supra* at Section I.A.1., Thomas is immune from suit under the doctrine of qualified immunity for claims based on Section 504 of the Rehabilitation Act. There is no significant difference in the analysis of the rights and obligations created by the ADA and the Rehabilitation Act.[3] *See Zukle v. Regents of University of California,* 166 F.3d 1041, 1045 n.11 (9th Cir. 1999). *See also Weinreich v. Los Angeles County Metro. Transp. Auth.,* 114 F.3d 976, 978 (9th Cir. 1997) ("Title II of

[3] Section 504 of the Rehabilitation Act is limited to entities receiving federal financial assistance. 29 U.S.C. § 794.

the ADA was expressly modeled after Section 504 of the Rehabilitation Act . . . ").

The Ninth Circuit Court of Appeals succinctly explained the parallels between the two acts in *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832 n.3 (9th Cir. 1995):

> The ADA defines a disability in substantially the same terms as the Rehabilitation Act defined a handicap (now disability). The ADA enlarges the scope of the Rehabilitation Act, however, by extending its prohibition against disability discrimination to private employers. The legislative history of the ADA indicates that Congress intended judicial interpretation of the Rehabilitation Act be incorporated by reference when interpreting the ADA. See Laura F. Rothstein, Disabilities and the Law § 3.12 (1992).

Therefore, due to the absence of clearly established law as to what quantum of proof is required before the State is obligated to reasonably accommodate a disabled person and the uncertainty as to whether Plaintiff's impairment substantially limits a major life activity, as that term is used in 29 U.S.C. § 705(20)(B), Thomas is entitled to qualified immunity against Plaintiff's claims under Section 504 of the Rehabilitation Act.

3. Thomas is entitled to qualified immunity for claims based on the due process clause of the Fourteenth Amendment

Plaintiff claims his rights to due process were violated by the Defendants' failure to provide him with a hearing prior to the termination of his VR Benefits. To determine if Thomas violated a "clearly established" due process right it is not enough to address whether Plaintiff is ever

entitled to a pre-termination hearing, but whether he was specifically entitled to such a hearing under the facts of this case. The Supreme Court instructed that in assessing claims of qualified immunity, reviewing courts must not view constitutional rights in the abstract but rather "in a more particularized, and hence more relevant, sense." *Anderson,* 483 U.S. at 640. It is not enough to say that the right to a hearing is clearly established when a property right is deprived, the court must look to the specific facts of the case to determine whether the right to a hearing under those facts was clearly established.

Thomas is entitled to qualified immunity if Plaintiff was clearly entitled to a hearing prior to the termination of his VR Benefits. Plaintiff has no such right, as discussed *infra* at III.A., thus, such a right is not "clearly established."

Further, the Ninth Circuit Court of Appeals has instructed us that almost all claims based on the due process clause will fall to the defense of qualified immunity. Determinations of what process is due under *Mathews v. Eldridge,* 424 U.S. 319 (1976) requires the court to balance the interests of the parties. "[B]ecause [the] procedural due process analysis essentially boils down to an ad hoc balancing inquiry, the law regarding procedural due process claims can rarely be considered 'clearly established' at least in the absence of closely corresponding factual and legal precedent." *Brewster v. Bd. of Education of Lynwood Unified School District,* 149 F.3d 971, 983 (9th Cir. 1998) (citing *Baker v. Racansky,* 887 F.2d 183, 187 (9th Cir. 1989)).

Plaintiff can point to no "closely corresponding" precedent requiring Thomas to grant a pre-termination

hearing, thus Thomas's plea in her motion for summary judgment for qualified immunity from Plaintiff's claims based on due process is hereby GRANTED.

B. Thomas may not be sued in her individual capacity under the ADA or Rehabilitation Act

1. Section 504 of the Rehabilitation Act does not permit actions against individuals in their individual capacity

Defendants argue Section 504 of the Rehabilitation Act does not permit an action against Alice Thomas in her individual capacity. The statute supports Defendants' argument as to against whom remedies may be sought:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

29 U.S.C. § 794a(2). Plaintiff does not assert that Defendant Thomas is a "recipient of Federal assistance or Federal provider of such assistance." The clear reading of the statute requires liability to extend only to such recipients or providers, thus Defendant Thomas cannot be sued in her individual capacity.

Although the Ninth Circuit Court of Appeals has not spoken on this issue, several other circuits have agreed with the above conclusion that the remedies provision of the Rehabilitation Act prohibits suits against individuals in their individual capacities. *See Baird v. Rose,* 192 F.3d

462, 472 (4th Cir. 1999); *Hiler v. Brown,* 177 F.3d 542, 545-46 (6th Cir. 1999).

2. Title II of the ADA does not permit actions against employees of a public entity in their individual capacities

Thomas is individually immune from suit, but, alternatively, as a matter of statutory interpretation, Thomas may not be held individually liable under the Americans with Disabilities Act.[4] Defendants' Motion asserts that no cause of action under the Americans with Disabilities Act may lie against Alice Thomas in her individual capacity because the act imposes liability on "entities" or "programs and activities" and not on individuals.

The statute reads:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Defendants argue that this language prohibits discrimination by a public entity, and thus the public entity, and not an individual employee of that entity, is the proper defendant.

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[4] Further, an analogous answer is required to the question of individual liability under the Rehabilitation Act. *See Zukle v. Regents of University of California*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999) (declaring that there is no significant difference in the analysis of the rights and obligations created by the ADA and the Rehabilitation Act).

The Ninth Circuit Court of Appeals has not addressed whether an individual may be sued in his or her individual capacity under Title II of the ADA.[5] The statute does not specifically authorize or prohibit such suits. Only one other circuit has spoken on the issue, concluding in a footnote that Title II of the ADA only permits suits against the public entity and not against employees in their individual capacities.

In *Alsbrook v. City of Maumelle,* 184 F.3d 999, 1004 n.8 (8th Cir. 1999), plaintiff sued the city of Maumelle, the state of Arkansas and the Arkansas Commission on Law Enforcement Standards and Training (ACLEST) claiming the physical requirements for police officers established by ACLEST discriminated against him on the basis of his disability in violation of the ADA. In the course of addressing State Defendants' Eleventh Amendment grounds for summary judgment, the court discussed in a footnote the possibility that Plaintiff intended to state a claim against defendants in their individual capacities:

> It is unclear from the complaint whether Alsbrook is asserting an ADA claim against the commissioners in their individual capacities. To the extent that he is, we agree with the panel opinion's conclusion that the commissioners may not be sued in their individual capacities directly under the provisions of Title II. Title II provides

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[5] The following district courts in the Ninth Circuit have held that individual employees are not subject to suit under Title I of the ADA: *Ostrach v. Regents of University of California*, 957 F. Supp. 196, 200 (E.D.CA 1997); *Lund v. J.C. Penney Outlet*, 911 F. Supp. 442, 445 (D.Nev. 1996); *Hardwick v. Curtis Trailers Inc.*, 896 F. Supp. 1037, 1038-1039 (D.Or. 1995); *Gallo v. Board of Regents of University of California*, 916 F. Supp. 1005 (S.D.Cal. 1995).

> disabled individuals redress for discrimination by a "public entity." [Citation omitted.] That term, as it is defined within the statute, does not include individuals. *See* 42 U.S.C. § 12131(1); *see also Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 19, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979) ("[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."). Furthermore, while no circuit has directly addressed the issue of individual liability under Title II, three have held that there is no liability under Title I against individuals who do not otherwise qualify as "employers" under the statutory definition. *See Butler v. City of Prairie Village,* 172 F.3d 736, 744 (10th Cir. 1999); *Mason v. Stallings,* 82 F.3d 1007, 1009 (11th Cir. 1996); *EEOC v. AIC Sec. Investigations, Ltd.,* 55 F.3d 1276, 1280-82 (7th Cir. 1995).

The reasoning of the Eighth Circuit in *Alsbrook* is persuasive and provides the better rule that individuals cannot be liable under the ADA in their individual capacities. Accordingly, Thomas is not a proper defendant to suits based on Title II of the ADA.[6]

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[6] Defendants claim that Plaintiff's failure to oppose Defendants' argument that neither the ADA nor Rehabilitation Act apply to Thomas in her individual capacity requires this Court find for the Defendants on this issue. *See* Defendants' Reply at 2. The Court need not default to that conclusion. The Court finds that neither law applies to individuals.

II. Plaintiff fails to identify a genuine issue of material fact as to his claims based on the ADA and Rehabilitation Act

Under the ADA and Rehabilitation Act,[7] a plaintiff must establish his prima facie case that he (1) is disabled under the Acts; (2) is "otherwise qualified" with or without reasonable accommodation to continue to receive VR Benefits from the Department of Labor and Industrial Relations and (3) was terminated from the VR Program solely because of his disability *Zukle,* 166 F.3d at 1045. Defendants claim that Plaintiff has failed to establish the first and third prongs of *Zukle.* This Court agrees that Plaintiff has failed to establish either of these prongs, and for that reason Defendants' Motion for Summary Judgment as to Plaintiff's ADA and Rehabilitation Act claims is hereby GRANTED.

A. Is Plaintiff disabled, as defined under the Acts?

A public entity is only obligated to make reasonable accommodations to disabled persons. The ADA defines a "disability" as:

> with respect to an individual – (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or

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[7] There is no significant difference in the analysis of the rights and obligations created by the ADA and the Rehabilitation Act. *See Zukle v. Regents of University of California*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999). *See also Weinreich v. Los Angeles County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997) ("Title II of the ADA was expressly modeled after Section 504 of the Rehabilitation Act . . . ").

> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). Although a public entity must accommodate "disabled" persons, a necessary precedent to this obligation is that the public entity be aware of the claimant's disability. Certainly, no duty may arise without the public entity first knowing that the claimant is entitled to accommodations under the ADA and the extent of accommodations required. This Court has already held that DLIR is entitled to require sufficient documentation of Plaintiff's disability before becoming obligated to make reasonable accommodations: "Before becoming obligated to reasonably accommodate Plaintiff's alleged disability of dyslexia, State Defendants were entitled to require medical documentation of that condition and the extent to which it limited his ability to fulfill the requirements of the vocational rehabilitation program." (April 9, 1997 Amended Order at 15). Such a finding is required by prudence and caselaw. To not permit public services to request documentary support would create a system rife with abuse.

The Court came to this conclusion relying on the support for this view offered by the U.S. Department of Education, Office of Civil Rights ("OCR"). In *Community College of Vermont*, 4 NDLR ¶ 406 (September 17, 1993), involving a student's claim that his school discriminated against him by failing to accommodate his dyslexia, OCR stated:

> Under OCR policy, institutions may require the student to provide documentation of the disability prior to being obligated to provide an accommodation. . . . The Complainant informed OCR he felt that CCV's request that he provide

> documentation of his disability was evidence of discrimination against students with disabilities .... [OCR concluded that] [t]he denial was based on the Complainant's failure to provide the necessary medical documentation of his disability .... Under Section 504 and the ADA, CCV had no obligation to accommodate the Complainant so long as he refused to provide medical documentation of his disability to CCV.

Vermont, (Exhibit G to Defendants' Motion). Plaintiff's Opposition agrees that an entity may require reasonable documentation of a disability before becoming obligated to accommodate that disability. (Plaintiff's Opposition at 10). Other courts have come to the same conclusion that public entities are entitled to request documentation of a claimant's disability. [8]

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[8] *See, e.g., Guckenberger v. Boston University*, 974 F. Supp. 106, 135 (D. Mass. 1997) (holding that the ADA permits a university to require a student to provide current documentation from a qualified professional concerning his learning disability); *Halasz v. Univ. of New England*, 816 F. Supp. 37, 46 (D. Me. 1993) (stating that none of the purposes of [Section 504 of the Rehabilitation Act] would be served by enforcing an inquiry prohibition when a university offers a program available only to handicapped students); *Farley v. Gibson Container Inc.*, 891 F. Supp. 322, 326 (N.D. Miss.1995) (finding that "[e]mployers should not be expected to recognize a physical impairment solely on an employee's 'say-so' "); *Kalekiristos v. CTF Hotel Management Corp.*, 958 F. Supp. 641, 657 (D.D.C. 1997) (holding that individuals "alleging a disability protected by the ADA [have] the burden of establishing with medical evidence the existence of the alleged disability"); *cf. Miller v. Nat'l Cas. Co.*, 61 F.3d 627, 629 (8th Cir. 1995) (regarding Title I of the ADA, the court relied on the Interpretative Guidance of the ADA stating that "an employer [is not] expected to accommodate disabilities of which it is unaware." 29 C.F.R. app. § 1630.9 (1994)); *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 675-676 (1st Cir. 1995) (allowing an employer to ask for medical certification from a treating

(Continued on following page)

Plaintiff contends, and provides evidence throughout Plaintiff's Opposition in support of his contention, that he is dyslexic and thus meets the definition of disabled under the ADA. He further contends that Defendants were made aware of his dyslexia through the documentation he provided and thus he has satisfied the requirement that he provide Defendants with adequate documentation of his disability.

The Court does not deny that Plaintiff provided evidence that Defendants were made aware that he may suffer from dyslexia. (Exhibits M, P and R to Defendants' Motion). It is not sufficient, however, that Defendants be merely on notice of the possibility that Plaintiff suffers from dyslexia; Defendants were entitled to require a diagnosis from a qualified medical professional. [9] Plaintiff

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psychiatrist); *Weinreich v. Los Angeles County Metropolitan Transp. Authority*, 114 F.3d 976, 978 (9th Cir. 1997).

[9] Not only are Defendants justified in requiring Plaintiff to provide evidence of his dyslexia, Defendants may require Plaintiff to demonstrate that he is disabled under the ADA. A public entity's obligations are triggered only upon a finding that a claimant is "disabled." 42 U.S.C. § 12132. A person is disabled under the Act if he is: (1) physically or mentally impaired (2) and the impairment substantial limits (3) one or more major life activities. 42 U.S.C. § 12102(2).

Plaintiff's evidence demonstrates that he attempted to make Defendants aware of his alleged impairment, specifically his dyslexia. Although dyslexia qualifies as a "mental impairment" under Section 12102(2), *see* 29 C.F.R. § 1630.2(h)(2), it is not sufficient to conclude that Plaintiff is disabled. A disabled person is one who is substantially limited due to his impairment. 42 U.S.C. § 12102(2).

Whether a dyslexic person is substantially limited in his major life activities requires a comparison to "the average person in the general population can perform," *see* 29 C.F.R. 1630.2(j)(1). Defendants argue that Plaintiff has not provided evidence that Plaintiff is substantially limited in his ability to learn. (Defendants' Motion at 23-25). Not only has Plaintiff failed to provide a diagnosis of his dyslexia, the Court

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has provided no evidence that such a diagnosis was made and presented to Defendants.[10]

Defendant Thomas requested a diagnosis on several different occasions. (Defendants' Motion at 20 (citing Exhibits O, Q and T of Defendants' Motion)). Plaintiff has provided no evidence that such a diagnosis existed or was transmitted to Defendants in response to Thomas's legitimate request. On the contrary, Plaintiff's own witness admits that she did not conclude a diagnosis until May 12, 1997, nearly four months after Plaintiff filed this suit, and that her correspondence to Plaintiff's counsel and ultimately to Defendants concerning Plaintiff's disability was

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agrees with Defendants that Plaintiff has not provided qualified evidence of Plaintiff's abilities and limitations, by which Defendants could conclude that he is substantially limited in his ability to learn in comparison with the average person.

Plaintiff's Concise Statement makes no reference to providing information concerning the effect Plaintiff's dyslexia would have on his learning. This request was specifically made by Thomas. (Exhibits O, Q and T to Defendants' Motion). Having failed to provide such evidence, Plaintiff has not met his burden of providing Defendants with evidence of his disability.

[10] Plaintiff provides the Declarations of Bruce Clark and Carol Forsloff to argue that Thomas should have known that Plaintiff was disabled based on the evidence provided to her. These declarations were not provided to Thomas prior to her decision to terminate Plaintiff's VR Benefits. Each of these declarations simply re-interprets facts already presented to the Court. This Court finds that Defendants were entitled to require a diagnosis of dyslexia from Plaintiff and that Plaintiff never provided such diagnosis. Whether Ms. Forsloff believed Plaintiff to be dyslexic, (Decl. of Forsloff at ¶ 15), or whether she was of the opinion that Thomas was simply "going through the motions," (*id.* at ¶ 13), is irrelevant to Plaintiff's obligation to provide evidence of a diagnosis. Further, Mr. Clark testifies only as to what accommodations would have been proper for a dyslexic person. This is relevant only after determining that Defendants were obligated to make such accommodations, which the Court does not believe was the case.

never intended to be a diagnosis. (Exh. D to Defendants' Motion, Deposition of Carol Lynne Douglas at 11, 25, 81-83).

Plaintiff, through his counsel, transmitted a series of letters to Thomas from various educational and health professionals, but none could qualify as a diagnosis of dyslexia. On July 25, 1996, Plaintiff's counsel, David Robinson, wrote a letter to Thomas attaching letters from Lorri Taniguchi, a health care nurse and coordinator of Services for Students With Disabilities; C. Lynne Douglas, the learning disability specialist at Leeward Community College; Monir Hodges, Computer Science Instructor from Honolulu Community College; Mary Kau, Manager of The Learning Center; articles entitled "General Facts About Dyslexia," "What Can Colleges and Universities Do to Implement Program Modifications?" and "Working on the Front Line: Implementing Instructional Strategies and Accommodations for Adults With Learning Disabilities;" and a brochure relating to software to assist dyslexic persons.

Thomas's response to this letter appropriately indicated that the articles and brochures would not be helpful in her effort to make an individualized determination as to whether Plaintiff was disabled and thus entitled to accommodations. The Court agrees with Defendants that none of the letters attached to Mr. Robinson's July 25, 1996 letter from health and educational professionals constitute a diagnosis as Thomas had earlier requested. As discussed above, Ms. Douglas did not intend her letter to be a diagnosis. (Exh. D to Defendants' Motion, Depo. of Douglas at 11, 25, 81-83). Ms. Kau and Ms. Taniguchi later admitted that their letters were not based on a diagnosis of dyslexia. (Aff. of Mary Kau at ¶¶ 5 and 6:

> In co-signing and writing these letters, I acted as an advocate on Mr. Vinson's behalf without testing, diagnosing, or actually confirming whether he had a learning disability. I am not and was not qualified to test, diagnose or confirm the existence of learning disabilities, and my letters cannot and were never intended to be treated as a learning disability diagnosis for Mr. Vinson);

and (Aff. of Lorri Taniguchi at ¶¶ 3 and 4 (same)). The letter from Mr. Hodges, a Computer Science Instructor at Honolulu Community College, by no means constitutes a diagnosis. Not only does the letter never mention dyslexia or Mr. Vinson, it only concludes that "many of us who use a computer a lot or for extended hours could benefit from the speech tools so we don't have to use the keyboard for extended hours."

Having failed to provide Defendants with documentary medical support of his alleged dyslexia, Defendants had no obligation to make reasonable accommodations under the ADA.[11] Therefore, Plaintiff has failed to

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[11] Defendant Thomas seemed genuinely interested in assisting Plaintiff in satisfying his obligation to provide a diagnosis. Her letter dated July 12, 1996 requested any and all medical information to include diagnoses and limitations. (Exhibit O to Defendants' Motion). When Plaintiff's response to this request was inadequate, she again wrote "Thank you for your July 25, 1996 correspondence. Apparently my request was not clear." She went on to specifically request diagnoses, test scores and the credentials of experts relied upon. (Exhibit Q to Defendants' Motion).

Later, Ms. Eustaquio, the Rehabilitation Specialist employed by Intracorp, which had been contracted by DLIR to provide rehabilitation services, sent a notice to Plaintiff containing a packet of information on where he may be tested and requesting Plaintiff sign a consent form allowing Intracorp to request his high school records. (Exhibit U to Defendants' Motion). Apparently, Plaintiff did not wish Intracorp to

(Continued on following page)

establish the first prong of Plaintiff's prima facie case under *Zukle* that he was disabled.[12]

B. Did Defendants terminate Plaintiff from the VR Program solely because of his disability?

Under *Zukle,* an ADA claim will only lie if a disabled claimant is denied benefits solely because of his disability. 166 F.3d at 1045. Defendants claim that Plaintiff was terminated from the VR Program for non-discriminatory reasons. Plaintiff has failed to provide evidence that these non-discriminatory reasons were not the reasons for Plaintiff's termination, but rather his disability was the sole reason for his termination from the VR Program. Having failed to meet this threshold burden, Plaintiff has failed to demonstrate the existence of a genuine dispute as to a material fact as to his ADA claims.

Defendants submit that Plaintiff was terminated from the VR Program due to the fact that Plaintiff's VR counselor, Eustaquio, no longer had Plaintiff's trust, that

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have access to his educational records. (Exhibit V to Defendants' Motion).

[12] Plaintiff strenuously argues that he is dyslexic and satisfies the definition of disabled under the Act. In arguing this position, Plaintiff misses the initial inquiry into whether he sufficiently communicated this to Defendants. Only after the Court has determined that Plaintiff has satisfied his burden of providing sufficient documentation of his disability to Defendants would an inquiry into whether Plaintiff is, in fact, disabled be relevant. Having concluded Plaintiff has not met his burden, the question of whether Plaintiff is, in fact, disabled is moot. Therefore, consideration of the testimony of Barbara Bateman, relating to whether Plaintiff is dyslexic, is not relevant.

Plaintiff had demonstrated proficiency in obtaining schooling and employment on his own and that Plaintiff evinced a preference to rely on resources and individuals outside the VR Program. (Defendants' Motion at 25-26 (citing Exhibits V at 6-7 and X to Defendants' Motion)).

Plaintiff responds by arguing that there exists:

> **ample evidence from which the trier of fact could determine that [Plaintiff's] case was first interrupted and then closed directly because of his disability. Alice Thomas made numerous incomprehensible documentation requests and refused to acknowledge the information from a number of others that [Plaintiff] was dyslexic and entitled to reasonable accommodations.**

(Pl.'s Opp. at 18). Plaintiff does not cite to the "ample evidence" that his case was interrupted due to discrimination on the basis of his disability. Nor does Plaintiff even make the argument that discrimination is the *sole* reason for his case's closure. Plaintiff only states that there is a genuine issue as to the *nexus* between Plaintiff's disability and his case's closure. (*Id.*). Plaintiff asks the Court to look to innuendo to conclude that Defendants acted to discriminate against Plaintiff and makes no attempt to disprove Defendants' otherwise legitimate reasons for closing Plaintiff's file.

Defendants have articulated valid reasons for terminating Plaintiff from the program. Plaintiff has not demonstrated that he was terminated from the program solely because of his disability. The Ninth Circuit Court of Appeals addressed essentially the same question in *Weinreich v. Los Angles County Metropolitan Transp. Authority,* 114 F.3d 976, 978 (9th Cir. 1997). In denying

plaintiff's ADA and Rehabilitation Act claims, the Court held that the County was permitted to require applicants to submit current medical documentation demonstrating their disability before benefitting from a reduced fare program. Denying an applicant the benefit of the program due to his failure to provide medical documentation of his disability will not amount to an ADA or Rehabilitation Act violation because the denial is not "solely" because of the applicant's disability:

> [E]xclusion was based on his failure to provide updated certification that he has a qualifying disability. Weinreich's inability to provide updated certification was due to his financial circumstances, not to his medical disability. Thus, the MTA's recertification policy did not discriminate against Weinreich on the basis of disability, and the MTA is not required under the ADA or Rehabilitation Act to make reasonable modifications to the Program's eligibility requirements for Weinreich.

Id. at 979.

Having not met his burden of providing evidence that he was discriminated against solely because of his disability, Defendants Thomas and DLIR's request for summary judgment as to Plaintiff's ADA claims is hereby GRANTED.

III. Plaintiff's due process claims are unavailable

Plaintiff argues that Defendants violated Plaintiff's procedural due process rights by denying Plaintiff a hearing prior to the termination of his VR Benefits and

that Defendants violated Plaintiff's substantive due process rights.

A. Procedural due process

1. Pre-termination hearing

This Court has already addressed Plaintiff's assertion that due process was violated when Defendants terminated Plaintiff's VR Benefits prior to providing Plaintiff with a hearing:

> Plaintiff is incorrect in his assertion that due process requires a pre-termination hearing before his disability benefits can be terminated. Hawaii law only provides for a post-termination hearing. Moreover, the Supreme Court has held in a case involving termination of Social Security disability benefits that "an evidentiary hearing is not required prior to the termination of disability benefits." *Mathews v. Eldridge,* 424 U.S. 319, 349 (1976). The facts of that case are very similar to the facts at issue here. The Supreme Court found that the administrative procedures in place, which included a post-termination evidentiary hearing and subsequent judicial review, fully comported with due process requirements. *Id.*
>
> This is precisely the procedure set up under the DLIR rehabilitation program. Plaintiff now has the right to an administrative hearing on the termination of his benefits. If Plaintiff is not satisfied with the outcome of that hearing, H.A.R. § 12-14-49 provides him with further administrative remedies. He can file a request for reconsideration with the director of DLIR and, if that request is denied, he then may appeal to the DLIR appeals board. If still dissatisfied, Plaintiff

> can appeal the board's decision directly to the Hawaii Supreme Court.
>
> The Court holds that this administrative process provided for under Hawaii law fully comports with the due process requirements of the Fourteenth Amendment. Accordingly, Plaintiff is not entitled to the first item of relief he requests in this motion.

(April 9, 1997 Amended Order at 13-14).

Plaintiff's argument again requests this Court declare that Defendants were in error in failing to provide a pre-termination opportunity to be heard. The Court finds no reason to depart from its earlier ruling or from the holding of *Sauceda v. Dep't of Labor & Industries,* 917 F.2d 1216 (9th Cir. 1990) (holding that denial of hearing prior to termination of disability benefits did not violate due process). In fact, since the date of the April 9, 1997 Amended Order, Plaintiff has been afforded a hearing and his VR Benefits have been reinstated. (Exhibit CC to Defendants' Motion).

2. Notice of suspension of benefits was given

Plaintiff complains that procedural due process was violated when, on August 2, 1996, his VR counseling was placed on "suspended-interrupted" status and that no further vocational rehabilitation counseling would be permitted until Plaintiff had provided the requested proof of his disability. VR Counseling would be permitted, however, to assist Plaintiff in obtaining such documentation.

This claim was not made in Plaintiff's Complaint. Plaintiff's procedural due process claims were based on Defendants' refusal to reconsider the termination of his VR Benefits and the failure to provide a pre-termination hearing. (Plaintiff's Complaint at ¶ 60). Despite the fact that Plaintiff's Complaint does not challenge the decision to place him on "suspended-interrupted" status, the Court will address this argument.

Being placed on "suspended-interrupted" status does not violate due process because Plaintiff was already on notice as to the justification for the suspension. Defendants specifically asked for documentation as to Plaintiff's disability and were denied a satisfactory response. (Exhibits O and Q of Defendants' Motion). Also, Plaintiff was on notice of his obligations under the Statement of Worker's Rights and Responsibilities, in which he acknowledged that he is obligated to "actively participate in the vocational rehabilitation process" and that "[f]ailure to actively participate may waive [claimant's] right to vocational rehabilitation benefits." (Exhibit K to Defendants' Motion). Plaintiff's new argument that due process was violated for lack of notice is unavailable.

Having already ruled on the constitutionality of the hearing procedures provided under the laws of the state of Hawaii for the termination of VR Benefits, and having concluded that Plaintiff was provided prior notice of his termination, this Court hereby GRANTS Defendants' motion for summary judgment as to Plaintiff's claims based on the procedural due process clause of the Fourteenth Amendment to the U.S. Constitution.

B. Substantive due process

Plaintiff also argues for the first time that his substantive due process rights were violated. This claim was also not made in Plaintiff's Complaint, but will be addressed here.

Substantive due process, according to Plaintiff, requires that "fair, written, valid standards be implemented and enforced by administrators, and [it] protects against arbitrary and capricious actions of state officials." (Plaintiff's Opposition at 26). Defendants are correct that Plaintiff's substantive due process claims must be denied. Plaintiff's characterization of substantive due process is in error and a correct formulation of the law does not provide Plaintiff relief.

The cases relied upon by Plaintiff undermine the proposition for which they are cited. In *Harrah Indep. School Dist. v. Martin,* 440 U.S. 194, 198 (1979), the Supreme Court reversed a circuit court for misunderstanding the substantive due process clause in precisely the way Plaintiff suggests this Court should construe it. The Supreme Court made clear that substantive due process protects an "individual's freedom of choice with respect to certain basic matters of procreation, marriage and family life," *id.*,[13] it does not protect against procedural abuses.

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[13] Plaintiff also cites *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985), which rejects an argument that substantive due process prohibits the arbitrary dismissal of a student from a state university. The Court only "assumed, without deciding" that the courts can review an academic decision of a public university under the substantive due process clause. *Id.* at 222. For Plaintiff's argument to be persuasive, he must suggest that the assumption of the Court should be treated as a holding. *Ewing* does not support Plaintiff's position.

The Ninth Circuit Court of Appeals has made clear that substantive due process will require a heightened scrutiny of government actions that deprive a person of life, liberty, or property in such a way that shocks the conscience or interferes with rights implicit in the concept of ordered liberty. *See Nunez v. City of Los Angeles,* 147 F.3d 867, 871 (9th Cir. 1998). Plaintiff is unable to demonstrate that the denial of VR Benefits or the termination of such benefits prior to a hearing "shocks the conscience."

In the absence of conditions requiring heightened scrutiny, a court will analyze a substantive due process claim under rational basis. To prevail, Plaintiff bears the heavy burden of demonstrating that Defendants had no "conceivable basis" of acting the way it did. *See Lupert v. California State Bar,* 761 F.2d 1325, 1328 (9th Cir. 1985); *Halverson v. Skagit County,* 42 F.3d 1257, 1262 (9th Cir. 1995) ("[W]e do not require that the government's action actually advance its stated purposes, but merely look to see whether the government could have had a legitimate reason for acting as it did."). It is irrelevant for constitutional purposes whether, at the time the legislature acted, it articulated the conceivable basis for the legislation. *See Kim v. United States,* 121 F.3d 1269, 1274 (9th Cir. 1997) ("The government need not state its purposes at the time it acts. It is sufficient that the government could have had a legitimate reason for acting as it did.").

Plaintiff argues that the failure of Defendants to promulgate valid, written, fair standards governing the quality and quantity of data necessary for an ADA claimant to satisfy his burden is a denial of substantive due process. This Court disagrees.

Substantive due process cannot require administrators to anticipate every possible request of them, such that a predetermined formula may govern their actions. Further, Plaintiff cannot satisfy his burden by demonstrating a better method by which a state may accomplish its purpose, he must show that the method employed by the state had no conceivable basis to achieve its legitimate goals. Substantive due process does not mandate the most rational or efficient method of achieving a goal, only a rational one. Here, Defendants had an obligation to request documentation of Plaintiff's alleged disability and dutifully made such a request. (Exhibit O of Defendants' Motion). Upon receipt of insufficient proof of his disability, Defendants clarified their request by specifying what would be required. (Exhibit Q of Defendants' Motion). The receipt to this second request was again insufficient so, rather than terminating Plaintiff from the program, he was placed on suspended/interrupted status to afford him additional time to gather the necessary documentation. (Exhibit T of Defendants' Motion).

The Court believes Defendants' conduct to be reasonable and appropriate to achieve their goal of determining whether Plaintiff was truly disabled, and thus entitled to accommodations, before expending limited public funds. For these reasons, Defendants' motion for summary judgment as to Plaintiff's claims under the substantive due process clause is hereby GRANTED.

IV. Thomas, in her official capacity, and DLIR are not proper defendants under Section 1983

Defendant seeks summary judgment arguing that DLIR and Thomas, in her official capacity, may not be sued under Section 1983.

Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

42 U.S.C. § 1983.

In *Will v. Michigan Dept. of State Police,* 491 U.S. 58 (1989), the Supreme Court addressed the scope of the term "person" under Section 1983. The court found that, for purposes of permitting suits for damages, "neither a State nor its officials acting in their official capacities are 'persons' under Section 1983." *Will,* 491 U.S. at 71. *See also Stivers v. Pierce,* 71 F.3d 732, 749 (9th Cir. 1995) (holding a state immune from Section 1983 suits); *Doe v. Lawrence Livermore Nat'l Laboratory,* 131 F.3d 836, 839 (9th Cir. 1997) (holding that an individual in his official capacity is not a "person" for purposes of a Section 1983 suit).

Plaintiff could not and does not challenge Defendants' assertion that Thomas in her official capacity and DLIR are not proper defendants under a Section 1983 suit. To the extent Plaintiff intended his claims under Section

1983 to reach Thomas in her official capacity or the DLIR, Defendants are GRANTED summary judgment.

V. DLIR is immune under the Eleventh Amendment from a suit based on Chapter 368 of the Hawaii Revised Statutes

Plaintiff argues that Thomas, in her official capacity, and DLIR are liable under Chapter 368 of the Hawaii Revised Statutes. Because the Eleventh Amendment bars suits against the states or their agencies when such suits are for money damages or when such a suit is based on state law, summary judgment is proper.

In the absence of consent, a suit in which the state or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment. *See Florida Department of Health v. Florida Nursing Home Ass'n,* 450 U.S. 147, 101 S. Ct. 1032, 67 L. Ed. 2d 132 (1981) (per curiam); *Alabama v. Pugh,* 438 U.S. 781, 98 S. Ct. 3057, 57 L. Ed. 2d 1114 (1978) (per curiam). This jurisdictional bar applies regardless of the nature of the relief sought. *See Missouri v. Fiske,* 290 U.S. 18, 27, 54 S. Ct. 18, 21, 78 L. Ed. 145 (1933).

When the suit is brought against state officials, a question arises as to whether that suit is a suit against the state itself, and thus barred by the Eleventh Amendment. The Court has found that suits challenging the constitutionality of a state official's action is not a suit against the state. *See Ex parte Young,* 209 U.S. 123 (1908). In *Young,* a federal court enjoined the Attorney General of the state of Minnesota from bringing suit to enforce a state statute that allegedly violated the Fourteenth Amendment. The Supreme Court held that the Eleventh Amendment did not prohibit issuance of this injunction because the state could

not authorize its officer to commit an act contrary to the supreme authority of the land; therefore any unconstitutional acts committed by that officer was not an act of the state. *Id.*, at 160. The officer was effectively "stripped of his official or representative character and [was] subjected in his person to the consequences of his individual conduct." *Id.*

The *Young* exception to Eleventh Amendment immunity has its limitations. In *Edelman v. Jordan,* 415 U.S. 651 (1974), the court emphasized that the Eleventh Amendment may permit a court to award an injunction that governs a state official's future conduct, but that court could not award retroactive monetary relief. Under the theory of *Young,* such a suit would be against the state since the monetary relief would ultimately come from the state treasury. *Edelman,* 415 U.S. at 666-667.

Defendants claim that the Eleventh Amendment bars any action against a state official in her official capacity if the basis of that relief is on state law. In short, Defendants claim the *Edelman* distinction between prospective and retroactive relief has no application when the claim is based on state law. Defendants are correct that the Eleventh Amendment immunizes DLIR and Thomas in her official capacity from Plaintiff's suit based on Chapter 368 of the Hawaii Revised Statutes.

In *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89 (1984), the Supreme Court expressly addressed the question of whether a state is immune from suit under the Eleventh Amendment when the suit is based on state law. Regardless of whether the suit seeks prospective relief or retroactive money damages, a suit based on state law against a state or state official in her official capacity is barred by the Eleventh Amendment:

> A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.

Id. at 106. As the Court explained, the need, which *Young* and *Edelman* attempted to address, to reconcile the competing interest of the supremacy of federal law and the sovereignty of the states does not exist when suit against a state is one based on state law. *Id.*

Plaintiff did not address *Pennhurst*'s holding, relying solely on the *Edelman* distinction between prospective and retroactive relief. Further, Plaintiff has made no argument that DLIR has waived its immunity under the Eleventh Amendment. Not having waived, DLIR, as an agency of the state of Hawaii, and Thomas in her official capacity, are immune from suit in federal court based on Chapter 368 of the Hawaii Revised Statutes.[14] As to Plaintiff's claims based on the laws of the state of Hawaii, Defendants are GRANTED summary judgment.

CONCLUSION

In accordance with the foregoing, it is ORDERED that Defendants' Motion for Summary Judgment as to all

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[14] Although disposed of on other grounds, for the reasons discussed above, the Eleventh Amendment bars suit against DLIR and Thomas in her official capacity to the extent Plaintiff's other claims would require money damages against the state.

claims asserted by Plaintiff against Defendant Thomas in her individual and official capacities and as to Defendant DLIR are GRANTED.

There being no claims remaining, Plaintiff's Complaint is hereby DISMISSED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, February 28, 2000.

/s/ Helen Gillmor
HELEN GILLMOR
United States District Judge

Civil No. 98-00761 HG *Vinson v. Thomas, et al.*; Order Granting Defendants Alice Thomas and the Department of Labor and Industrial Relations' Motion for Summary Judgment file on November 12, 1999.

AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

Brian Vinson

Plaintiff(s),

V.

Alice Thomas, et al

Defendant(s).

JUDGMENT IN A CIVIL CASE

Case: CIVIL 97-00091HG

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

March 1, 2000

At 4 o'clock and 00 min. p.m.
WALTER A.Y.H. CHINN,
CLERK

[ ] **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[✓] **Decision by Court.** This action came for hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that Defendants' Motion for Summary Judgment as to all claims asserted by Plaintiff against Defendant Thomas in her individual and official capacities and as to Defendant Department of Labor and Industrial Relations are GRANTED.

IT IS FURTHER ORDERED that the Complaint is hereby DISMISSED.

CC: Thomas Grande
J. Gerard Lam

March 1, 2000
Date

WALTER A.Y.H. CHINN
Clerk

/s/ Barbara Yameda
(By) Deputy Clerk

U.S. CONST. amend. XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

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29 U.S.C. § 794

§ 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations. No otherwise qualified individual with a disability in the United States, as defined in section 7 (20) [29 USCS § 706(20)], of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined. For the purposes of this section, the term "program or activity" means all of the operations of –

(1)

(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)

(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 9101 of the Elementary and Secondary Education Act of 1965 [20 USCS § 7801]), system of vocational education, or other school system;

(3)

(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship –

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers. Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on the date of the enactment of this subsection [enacted March 22, 1988].

(d) Standards used in determining violation of section The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment

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29 U.S.C. § 794a

§ 794a. Remedies and attorney's fees

(a) (1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5 (f) through (k)), shall be available, with respect to any complaint under section 501 of this Act [29 USCS § 791], to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 USCS 2000d et seq.) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act [29 USCS § 794].

(b) In any action or proceeding to enforce or charge a violation of a provision of this title [29 USCS §§ 790 et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs

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42 U.S.C. § 2000d-7

§ 2000d-7. Civil rights remedies equalization

(a) General provision.

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 USCS 794], title IX of the Education Amendments of 1972 [20 USCS §§ 1681 et seq.], the Age Discrimination Act of 1975 [42 USCS §§ 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

(b) Effective date The provisions of subsection (a) shall take effect with respect to violations that occur in whole or in part after the date of enactment of the Rehabilitation Act Amendments of 1986 [enacted Oct. 21, 1986].

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42 U.S.C. § 12132

§ 12132. Discrimination

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity

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42 U.S.C. § 12133

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202 [42 USCS § 12132].

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42 U.S.C. § 12202

§ 12202. State immunity.

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available

for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

(2)

Supreme Court, U.S.
FILED
SEP 27 2002
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No. 01-1878

In the

Supreme Court of the United States

ALICE THOMAS, individually and in her capacity as the Director of the Vocational Rehabilitation Branch of the Department of Labor and Industrial Relations, State of Hawaii; and DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, STATE OF HAWAII,

Petitioners,

v.

BRIAN VINSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the State of Hawai`i waived its Eleventh Amendment immunity from suit for disability discrimination under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, when it applied for and accepted federal financial assistance.

PARTIES TO THE PROCEEDINGS

Petitioners, defendants-appellees in the court below, are the State of Hawai`i, the Department of Labor and Industrial Relations of the State of Hawai`i, and Alice Thomas in her official capacity as the Director of the Vocational Rehabilitation Branch of the Department of Labor and Industrial Relations of the State of Hawai`i ("DLIR").

Respondents are Brian Vinson, plaintiff-appellant in the court below, and the United States of America, intervenor in the court below.

Alice Thomas, in her individual capacity, and Intracorp, a Delaware corporation, were also defendants-appellees in the court below, but are not petitioners.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

BRIEF IN OPPOSITION STATEMENT 1

REASONS FOR DENYING THE PETITION 4

I. SECTION 2000D-7 OF TITLE 42 PROVIDES THAT "[A] STATE SHALL NOT BE IMMUNE UNDER THE ELEVENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES FROM SUIT IN FEDERAL COURT FOR A VIOLATION OF SECTION 504 OF THE REHABILITATION ACT OF 1973" AND IS VALID AND BINDING ON PETITIONERS 7

II. PETITIONERS CONTENTION (16-20) THAT THIS COURT HAS CONCLUDED THAT SECTION 2000D-7(A) IS AMBIGUOUS AND DID NOT PUT THEM ON NOTICE THAT THEY COULD BE LIABLE FOR MONEY DAMAGES IS ERRONEOUS 9

III. THERE IS NO MERIT TO PETITIONERS' CONTENTION (PET. 20-23) THAT A CLEAR STATEMENT BY CONGRESS REGARDING THE AVAILABILITY OF A PRIVATE CAUSE OF ACTION IS A PREREQUISITE TO A STATE WAIVING ITS SOVEREIGN IMMUNITY 14

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

AIRCRAFT & DIESEL EQUIP. CORP. v. HIRSCH, 331 U.S. 752 (1947) 6

ALDEN v. MAINE, 527 U.S. 706 (1999) 8, 15

ALEXANDER v. SANDOVAL, 532 U.S. 275 (2001) 10, 11

ARKANSAS DEPT. OF EDUC. v. JIM C., 533 U.S. 949 (2001) ... 5, 11

ATASCADERO STATE HOSP. v. SCANLON, 473 U.S. 234 (1985) 2, 7, 9

BANKERS LIFE & CAS. CO. v. CRENSHAW, 486 U.S. 71 (1988) 6

BARNES v. GORMAN, 122 S. CT. 2097 (2002) ..... *passim*

BELL v. NEW JERSEY, 461 U.S. 773 (1983) 9

BOARD OF EDUC. v. KELLY E., 207 F.3D 931 (7TH CIR. 2000), CERT. DENIED, 531 U.S. 821 (2000) 12

BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA v. GARRETT, 531 U.S. 356 (2001) 3, 5

BURNS-VIDLAK v. CHANDLER, 980 F. SUPP. 1144 (D. HAW. 1997) 10

CANNON v. UNIV. OF CHICAGO, 441 U.S. 677 (1979) 10, 14, 15

CHERRY v. UNIV. OF WIS. SYS. BD. OF REGENTS, 265 F.3D 541 (7TH CIR. 2001) 11

CLARK v. CALIFORNIA, 123 F.3D 1267 (9TH CIR. 1997) 12

COLLEGE SAVINGS BANK v. FLORIDA PREPAID POST SECONDARY EDUC. EXPENSE BD., 527 U.S. 666 (1999) 16

COURT OF COMMON PLEAS OF OHIO v POPOVICH, NO. 01-503 (U.S. APR. 8, 2002) 5

DOUGLAS v. CALIFORNIA DEPT OF YOUTH AUTH., 271 F.3D 812, 820, OPINION AMENDED, 271 F.3D 910 (9TH CIR. 2001), CERT. DENIED ON OTHER GROUNDS, 122 S. CT. 2591 (2002) 4, 5, 11

ELLIS V. DIXON, 349 U.S. 458 (1955) 6

FERGUSON V. CITY OF PHOENIX, 157 F.3D 668 (9TH CIR. 1998) 10

FRANKLIN V. GWINNETT COUNTY PUB. SCH., 503 U.S. 60 (1992) 10, 13

FW/PBS, INC. V. CITY OF DALLAS, 493 U.S. 215 (1990) 6

GARCIA V. S.U.N.Y. HEALTH SCIS. CTR. OF BROOKLYN, 280 F.3D 98 (2ND CIR. 2001) 6, 12

GEBSER V. LAGO VISTA INDEP. SCH. DIST., 524 U.S. 274 (1998) 15

GEORGE MASON UNIVERSITY V. LITMAN, 186 F.3D 544 (4TH CIR. 1999), CERT. DENIED, 528 U.S. 1181 (2000) 5, 11

GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC. V. ZOLIN, 812 F.2D 1103 (9TH CIR. 1987) 11

GROVE CITY COLLEGE V. BELL, 465 U.S. 555 (1984) 8

GUARDIANS ASS'N V. CIVIL SERV. COMM'N OF CITY OF NEW YORK, 463 U.S. 582 (1983) 15

IN RE INNES, 184 F.3D 1275 (10TH CIR. 1999)(DICTUM), CERT. DENIED, 529 U.S. 1037 (2000) 12

INTERNATIONAL BHD. OF TEAMSTERS V. DENVER MILK PRODUCERS, INC., 334 U.S. 809 (1948) 6

JIM C. V. U.S., 235 F.3D 1079 (8TH CIR. 2000)(EN BANC) 5, 11

KANSAS V. U.S., 531 U.S. 1035 (2000) 11

KANSAS V. UNITED STATES, 214 F.3D 1196 (10TH CIR. 2000)("IN THIS CONTEXT, A DIFFICULT CHOICE REMAINS A CHOICE, AND A TEMPTING OFFER IS STILL BUT AN OFFER"), CERT. DENIED, 121 S. CT. 623 (2000) 8

KOSLOW V. PENNSYLVANIA, __F3D __, 2002 WL 1925569 (3RD CIR. 2002) 11

LANE V. PENA, 518 U.S. 187 (1996) 9, 10

LAPIDES V. BD. OF REGENTS OF UNIV. SYS. OF GA., 122 S. CT. 1640 (2002) 9

LOVELL V. CHANDLER, __ F.3D __, 2002 WL 2022140, *7-8 (9TH CIR. 2002) 11

MORENO V. CONSOLIDATED RAIL CORP., 99 F.3D 782 (6TH CIR. 1996)(EN BANC) 1

NEW YORK V. U.S., 505 U.S. 144 (1992) 9, 14

NIHISER V. OHIO ENVTL. PROT. AGENCY, 269 F.3D 626 (6TH CIR. 2001), CERT. DENIED, 122 S. CT. 2588 (2002) 5

OKLAHOMA TAX COMM'N. V. CHICKASAW NATION, 515 U.S. 450 (1995) 6

OLMSTEAD V. L.C., 527 U.S. 581 (1999) 1, 16

PEDERSON V. LOUISIANA STATE UNIV., 213 F.3D 858 (5TH CIR. 2000) 11

PETTY V. TENNESSEE-MISSOURI BRIDGE COMMISSION, 359 U.S. 275 (1959) 16

RESCUE ARMY V. MUN. COURT OF LOS ANGELES, 331 U.S. 549 (1947) 6

ROBINSON V. KANSAS, 295 F.3D 1183 (10TH CIR. 2002) 11

SANDOVAL V. HAGAN, 197 F.3D 484 (11TH CIR. 1999) 11

SOUTH DAKOTA V. DOLE, 483 U.S. 203 (1987) 14, 16

STANLEY V. LITSCHER, 213 F.3D 340 (7TH CIR. 2000) 11

UNITED STATES V. UNITED FOODS, INC., 533 U.S. 405 (2001) 6

UNITED STATES V. WILLIAMS, 504 U.S. 36 (1992) 6

WILSON V. ARMSTRONG, 524 U.S. 937 (1998) 12

STATUTES

20 U.S.C. §1681 2

28 U.S.C. §1254 1

28 U.S.C. §2403(a) 4

29 U.S.C. §§701 1
29 U.S.C. §794 ..... i, 2
29 U.S.C. §794a(a)(2) 14, 15
29 U.S.C.794 (a)(1994 & Supp. V 1999) 1
42 U.S.C. §6101 2
42 U.S.C. §12201 ..... 1, 7
42 U.S.C. 2000d 2
42 U.S.C. §2000d-7 ..... 1, 2
Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845, 42 1
Pub.L.No. 99-506, Tit. X, §1003, 100 Stat. 1845 (1985) 2
Pub.L.No. 95-602, 92 Stat. 2955 14

REGULATIONS

28 C.F.R. Section 35.105 3

OPINIONS BELOW

The opinion of the court of appeals is reported at 288 F.3d 1145 (9th Cir. 2002), and is reprinted in the Petitioners' Appendix ("Pet. App.") at 1a. The opinion of the district court is not reported; it is reprinted at Pet. App. 31a.

JURISDICTION

Judgment of the court of appeals was entered on May 3, 2002. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution and relevant provisions of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701, *et seq.*, the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, *et seq.*, and the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845, 42 U.S.C. § 2000d-7, are reprinted in Pet. App. 78a-83a.

BRIEF IN OPPOSITION STATEMENT

1. Section 504 (a) prohibits any "program or activity receiving Federal financial assistance" from "subject[ing any person] to discrimination" on the basis of disability. 29 U.S.C. 794 (a)(1994 & Supp. V 1999). Individuals have a private right of action for damages against entities that receive federal funds and violate that prohibition. *See Olmstead v. L.C.*, 527 U.S. 581, 590 n.4 (1999); *Moreno v. Consolidated Rail Corp.*, 99 F.3d 782, 789 (6th Cir. 1996)(en banc).

2. In 1985, this Court ruled that Section 504 was not clear enough to show Congress' intent to condition federal funding on a waiver of the Eleventh Amendment immunity for private damage suits against state entities. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 245-246

(1985). The direct and prompt Congressional response was to enact 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub.L.No. 99-506, Tit. X, §1003, 100 Stat. 1845 (1985). Section 2000d-7 provides in pertinent part that:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.] or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

3. Respondent Brian Vinson was a fully employed workman for a flooring contractor. In 1993, while installing flooring, he severely injured his neck and back. He received worker's compensation benefits, including vocational rehabilitation benefits, paid for by his employer's worker's compensation carrier, which in turn contracted with a private company to develop and manage his vocational rehabilitation plan. The rehabilitation plan had to be approved by the Petitioner DILR, through its administrator, Petitioner Alice Thomas. Without ever interviewing Vinson, or reviewing his actual plan, Ms. Thomas ordered Vinson to carry at least 15 full-time credit hours or suffer termination of his vocational rehabilitation benefits, including attending college. When Vinson informed Ms. Thomas that it was impossible for him to carry such a course load because of his dyslexia, Ms. Thomas ordered Vinson's case closed, because the rehabilitation plan being considered included accommodations for Vinson's dyslexia to permit him to carry less than 15 credits. Ms. Thomas concluded that Vinson had failed to provide sufficient medical information to support

the asserted disability. Therefore, she concluded the plan was "not feasible." Pet. App. 3a-8a.

4. Respondent filed suit in district court, alleging that petitioners' conduct violated Title II of the ADA and Section 504 of the Rehabilitation Act. He alleged that Thomas and the DLIR discriminated against him by denying his request for vocational rehabilitation schooling benefits without making reasonable accommodations for his dyslexia. He sought reinstatement of his vocational rehabilitation benefits, monetary damages and injunctive relief ordering and directing the petitioners to comply with the self-evaluation and transition plan requirements of the Section 504 regulations. After Vinson filed his lawsuit, the district court granted injunctive relief which resulted in the DLIR reopening his case and his being granted vocational rehabilitation benefits, including schooling, at his requested pace of study. Over the next two years, pursuant to the requirements of the injunction, the petitioners undertook the self-evaluation (and prepared the necessary transition plan) required under 28 C.F.R. Section 35.105. The only remaining claim was Vinson's claim for monetary damages.

The petitioners filed for summary judgment on liability, which the district court granted, but the petitioners did not raise the defense of Eleventh Amendment immunity from claims arising under Title II ("abrogation of immunity"), or Section 504 ("waiver of immunity"), in this motion. Therefore, the district court did not address the Eleventh Amendment. Pet. App. 31a-75a.

Respondent Vinson appealed the district court decision on three grounds, none of which involved the sovereign immunity issues raised by petitioners in this Court. *See* Plaintiff-Appellant Brian Vinson's Opening Brief, filed July 26, 2000 at 1-2. After opening and answering briefs had been filed, the court of appeals ordered the parties to file supplemental briefs discussing the effect of this Court's decision in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001). *See* filed Order dated April 19, 2001. In its supplemental brief, petitioners argued that Vinson's "...Section 504 claims also fail to defeat the State's

Eleventh Amendment immunity because Section 504 does not represent a valid exercise of Congress' spending clause powers." *See* Defendant-Appellee Alice Thomas, et al.'s supplemental letter brief filed April 26, 2001, at 2. Respondent urged the contrary. *See* Plaintiff-Appellant Brian Vinson's supplemental letter brief filed April 26, 2001. The United States intervened on appeal, pursuant to 28 U.S.C. 2403(a), to defend, *inter alia*, the constitutionality of the provisions of law conditioning the states' receipt of federal funding on the waiver of Eleventh Amendment immunity. In reply, the sole issue addressed by petitioners was "whether the intended abrogations [under Title II and Section 504] were enacted pursuant to a valid exercise of congressional power under the Enforcement Clause of the Fourteenth Amendment."

5. At oral argument before the court of appeals, petitioners abandoned the position set forth in their supplemental brief to the court of appeals [*compare* Defendant-Appellees Alice Thomas, et al.'s Replacement Answering Brief filed September 25, 2000 *with* Brief for Defendants-Appellees in Response to Brief of Intervenor United States at p. 21 ("Section 504 is not Spending Clause legislation at all. It is Fourteenth Amendment legislation, and invalid at that.")]. During oral argument in the Court of Appeals, respondent waived any separate claim against the petitioners under Title II of the ADA. Pet. App. 2a n.1. No Title II claim remains in this case.

REASONS FOR DENYING THE PETITION

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The decision of the court of appeals stated that the state's arguments on the sovereign immunity issue were foreclosed by the court's decision in *Douglas v. California Dept of Youth Auth.*, 271 F.3d 812, 820, *opinion amended*, 271 F.3d 910 (9th Cir. 2001).[1] A petition for a writ of

[1] The court stated: "Consistent with our recent decision in *Douglas v. California Department of Youth Authority*, 271 F.3d 812, as amended, 271

certiorari was filed in *Douglas*, and was denied by this Court on other grounds. 122 S. Ct. 2591 (2002). This Court has denied a petition for a writ of certiorari in a number of other cases presenting virtually identical Eleventh Amendment issues, including *Nihiser v. Ohio Envtl. Prot. Agency*, 269 F.3d 626 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 2588 (2002); *Jim C. v. U.S.*, 235 F.3d 1079 (8th Cir. 2000)(en banc), *cert. denied sub nom. Arkansas Dept. of Educ. v. Jim C.*, 533 U.S. 949 (2001); and *George Mason University v. Litman*, 186 F.3d 544 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000).

In the court of appeals, petitioners' argument was that Section 504 was not Spending Legislation, but rather was an improper exercise of Congress's authority under Section 5 of the Fourteenth Amendment. This argument is, however, foreclosed by this Court's decision in *Barnes v. Gorman*, 122 S. Ct. 2097, 2103 n.3 (2002)(stating that the Rehabilitation Act is Spending Act legislation). Effectively acknowledging that their prior argument was without merit, petitioners raise new arguments in their petition that were not presented to, nor addressed by, the court of appeals. In particular, the petition in this case would require this Court to address whether Title II of the ADA's abrogation of sovereign immunity is constitutional, even though there is no longer a Title II claim in this case and the court of appeals did not consider this question. *See* Pet. at 2, *citing Court of Common Pleas of Ohio v. Popovich*, No. 01-1503 (U.S. Apr. 8, 2002) (a case with no Section 504 claim in which the petitioner seeks to resolve

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F.3d 910 (9th Cir. 2001), we hold that by its acceptance of federal Rehabilitation Act funds, the State waived its Eleventh Amendment immunity as to Vinson's claim under section 504 of the Rehabilitation Act." Pet. App. 2a. It also stated: "We first address the DLIR's contention that it is protected from suit on Vinson's Rehabilitation Act claim by sovereign immunity under the Eleventh Amendment. This argument is foreclosed by our recent decision in *Douglas*. In that case, we reaffirmed, following the Supreme Court's decision in *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), our previous holding in *Clark v. California*, 123 F.3d 1267, 1271 (9th Cir. 1997), that States are subject to suit in federal court under section 504 of the Rehabilitation Act if they accept federal Rehabilitation funds. The state of Hawai'i accepted federal Rehabilitations funds. Therefore, the Eleventh Amendment is not a bar to Vinson's Section 504 claim against the DLIR. *See Douglas*, 271 F.3d at 820-21. We now turn to the merits of that claim." Pet. App. 9a.

whether Congress, in Title II of the Disabilities Act, has validly abrogated the state court's Eleventh Amendment immunity from suit); and *Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn*, 280 F.3d 98 (2nd Cir. 2001)(holding that Title II was a valid abrogation of Eleventh Amendment immunity in cases alleging a Title II violation motivated by discriminatory animus, or ill will, based on the plaintiff's disability, and that Section 504 waivers of immunity could not be voluntary in light of Title II's abrogation).

The petitioners' position is that the abrogation of immunity under Title II gave it no meaningful choice as to waiver of immunity under Section 504. Pet. at 4-6; 11-16. This Court does not ordinarily grant review to consider questions that were neither pressed, nor passed upon, below. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001); *see also United States v. Williams*, 504 U.S. 36, 42 (1992); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 217 (1990). This is a court of "review, not one of first view," *Oklahoma Tax Comm'n. v. Chickasaw Nation*, 515 U.S. 450, 457 (1995), and the failure of the petitioners to raise these arguments below denies this Court "the benefit of a well-developed record and a reasoned opinion on the merits." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 80 (1988). Where the appellate record is inadequate and does not factually frame the constitutional principles involved, *certiorari* should be denied. *See International Bhd. of Teamsters v. Denver Milk Producers, Inc.*, 334 U.S. 809 (1948); *Rescue Army v. Mun. Court of Los Angeles*, 331 U.S. 549, 575-585 (1947); *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 762-763 (1947). *See also Ellis v. Dixon*, 349 U.S. 458 (1955). These principles are particularly compelling in a case like this because this Court could not even reach the Section 504 question raised by the petitioners without first addressing and resolving abrogation of immunity issues under Title II of the ADA, even though there is no Title II claim in this case.

I. SECTION 2000D-7 OF TITLE 42 PROVIDES THAT "[A] STATE SHALL NOT BE IMMUNE UNDER THE ELEVENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES FROM SUIT IN FEDERAL COURT FOR A VIOLATION OF SECTION 504 OF THE REHABILITATION ACT OF 1973" AND IS VALID AND BINDING ON PETITIONERS.

Petitioners contend (Pet. 11–16) that this provision, passed in 1986, is not effective because Congress, several years later, abrogated the states' immunity from suits for discrimination under Title II so that Hawai`i "lacked any meaningful choice of retaining its immunity." Pet. at. 13. In addition to the fact that this argument was not briefed in, or addressed by, the court of appeals, petitioners' argument is without merit because every state agency did know from the plain text of Section 2000d-7, from the time it was enacted, that acceptance of federal funds constituted a waiver of immunity from suit for violation of Section 504. Section 504 was not amended or altered by the enactment of Title II of the ADA in 1990 (which was not effective until 1992), and it was clear that plaintiffs could sue under either statute. *See* 42 U.S.C. 12201 (b) (preserving existing causes of action).[2] It is, thus, untenable to suggest that abrogation of immunity for suits under one statute is relevant to whether an entity waived its immunity to suits brought to enforce a distinct, albeit substantively similar, statute.

Petitioners suggest that the state had no meaningful alternative to waiving its immunity under Section 504

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[2] The contention that Title II made the state's Section 504 waiver redundant was recently rejected by the Third Circuit Court of Appeals in *Koslow v. Pennsylvania*, __F3d __, 2002 WL 1925569 n 12 (3rd Cir. 2002). The court noted that "the ADA was not enacted to alter existing causes of action. See 42 U.S.C.§ 12201(b)(retaining existing causes of action). Therefore, the "clear intent to condition participation in the programs funded" required by *Atascadero*, 473 U.S. at 247, ensured the Commonwealth of Pennsylvania knew that by accepting certain federal funds under the Rehabilitation Act for certain departments or agencies, it waived immunity from suit on Rehabilitation Act claims for those entities".

because of the existence of the ADA. However, petitioners ignore the period from 1986-1992, when only Section 2000d-7's statutory waiver was effective. Indeed, there is no evidence in the record suggesting the State of Hawai`i refused federal funds between the effective date of Section 2000d-7 and the effective date of Title II, a period during which it clearly could not have been influenced by the abrogation provisions in the ADA. There is also no evidence in the record that the state changed its conduct during the 1986-1992 period, or at any other time between 1986-2002.

Petitioners have not identified anything about Title II or Section 504 that deprived the state of its ability to say "no" to the offer of Section 504 federal funds for any agency it does not want to be subjected to the non-discrimination requirements of Section 504. While it may not be easy to decline federal funding – and while theoretically the existence of Title II may have made the choice harder, petitioners still have not shown the state was deprived of that choice in the constitutional sense[3]. *See Grove City College v. Bell*, 465 U.S. 555, 575 (1984); *Kansas v. United States*, 214 F.3d 1196, 1203, 1204 (10th Cir. 2000)("in this context, a difficult choice remains a choice, and a tempting offer is still but an offer"), *cert. denied*, 121 S. Ct. 623 (2000). Because one of the critical purposes of the Eleventh Amendment is to protect the "financial integrity of the States," *Alden v. Maine*, 527 U.S. 706, 750 (1999), it is perfectly appropriate to permit each state to make its own cost-benefit analysis for each state

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[3] The Petitioners are arguing, in effect, that if there is any other law that prohibits the discrimination in which the recipient may want to engage, then it has no choice but to accept the federal funds because even if it does not accept, it cannot discriminate. If the Petitioners are correct, the State's waiver of its immunity with respect to Title IX is also ineffective because the Fourteenth Amendment already prohibits sex discrimination in public education; similarly, its waiver of immunity with respect to Title VI is ineffective because of race discrimination prohibitions in the Fourteenth Amendment, Section 1981, and Title VII. Thus, in areas where multiple laws may use different tools to address the same problem, the petitioners are implicitly urging significant and heretofore unrecognized limits on the federal government's Spending Clause right to place conditions on the receipt of federal funds. Obviously, these limitations could well impact Congress' willingness to provide federal funding to the States in a wide range of vital programs.

agency it has established and determine whether to accept the federal money with the condition that that agency can be sued in federal court, or forgo the federal funds. *See New York v. U.S.*, 505 U.S. 144, 168 (1992). Title II may or may not have been part of petitioner's cost-benefit analysis, implicitly or explicitly. Nonetheless, once the state made its choice, "[r]equiring States to honor the obligations voluntarily assumed as a condition of federal funding *** simply does not intrude on their sovereignty." *Bell v. New Jersey*, 461 U.S. 773, 790 (1983). *See also Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 122 S. Ct. 1640 (2002), where this Court ruled that a state can waive its Eleventh Amendment immunity by removing a case to federal court.

The state cannot show that the enactment of Title II meant that it no longer had a choice on whether to accept Section 504 funds. It still had that choice, and its assent to the waiver was manifested in its voluntary action in accepting the federal funds.

II. PETITIONERS CONTENTION (16-20) THAT THIS COURT HAS CONCLUDED THAT SECTION 2000D-7(A) IS AMBIGUOUS AND DID NOT PUT THEM ON NOTICE THAT THEY COULD BE LIABLE FOR MONEY DAMAGES IS ERRONEOUS.

Petitioners' notice argument is completely foreclosed by the decisions of this Court, as well as by petitioners' own position in this case. First, petitioners argue (Pet. at 17) that *Lane v. Pena*, 518 U.S. 187 (1996), supports their contention that Section 2000d-7(a) is ambiguous, even urging that "[b]ecause *Lane* holds that monetary damages for violation of Section 504 are not available against federal public entities, neither are they available against States." Pet. at 19. Section 2000d-7 was enacted in response to the Supreme Court's decision in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985). In *Atascadero*, this Court held that Congress had not unmistakably expressed its intent to abrogate the states' Eleventh Amendment immunity in the Rehabilitation Act, and that the states, accordingly, were not "subject to suit in

federal court by litigants *seeking retroactive monetary relief under § 504.*" *Atascadero* at 235. (Emphasis added).

In *Lane*, this Court acknowledged "the care with which Congress responded to our decision in *Atascadero* by crafting an unambiguous waiver of the States' Eleventh Amendment immunity" in Section 2000d-7. 518 U.S. at 200. This express language in *Lane*, which petitioners do not address, in and of itself disposes of petitioners' ambiguity argument. There is no question that under *Lane* money damages for violations of Section 504 are available against the states and Petitioners' contention (Pet. App. at 19-20) that "Congress has not set forth a clear statement notifying the States that accepting Rehabilitation Act funds waives sovereign immunity with respect to claims for monetary damages" is clearly wrong. Moreover, it must be noted that petitioners' contention that 2000d-7 is ambiguous could not be accepted without this Court's reversal of numerous recent decisions in addition to *Lane*, including *Alexander v. Sandoval*, 532 U.S. 275, 279-280 (2001) (Section 2000d-7 ratifies the holding in *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979) that private individuals may sue to enforce Section 601 of Title VI and obtain both injunctive relief and damages); *Cannon v. University of Chicago*, 441 U.S. 677 (1979)(a private right of action existed to enforce Title IX of the Education Amendments); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992)(Section 2000d-7 "cannot be read except as a validation of *Cannon's* holding.") *Id.* at 72; *see also Id.* at 78 (Scalia, J., concurring in judgment).

Nor did petitioners urge their interpretation of *Lane* before the court of appeals. To the contrary, they admitted that Section 504 remedies included: (1) injunctive relief; (2) compensatory damages, at least for intentional discrimination, citing *Ferguson v. City of Phoenix*, 157 F.3d 668, 674 (9th Cir. 1998); (3) punitive damages, *Burns-Vidlak v. Chandler*, 980 F. Supp. 1144, 1147-48 (D. Haw. 1997)(collecting cases)[4]; and (4) attorneys' fees.[5] They cannot

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[5] Petitioners' Replacement Answering Brief filed September 25, 2000 at 10.

deny notice of these remedies, since the Ninth Circuit held that compensatory damages were available in private Section 504 actions almost fifteen years ago. *See Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1107 (9th Cir. 1987). [6]

Moreover, the courts of appeal are in agreement that the language of Section 2000d-7 clearly put the states on complete notice that by accepting federal financial assistance, states and state entities waive sovereign immunity from suits alleging discrimination under Section 504. *See Lovell v. Chandler*, __ *F.3d* __, *2002 WL 2022140, *7-8 (9th Cir. 2002); Koslow v. Pennsylvania*, __*F3d* __, 2002 WL 1925569 *(3rd Cir. 2002); Robinson v. Kansas*, 295 F.3d 1183, 1190 (10th Cir. 2002); *Douglas v. California Dep't of Youth Auth.*, 271 F.3d 812, 820, *opinion amended*, 271 F.3d 910 (9th Cir. 2001), *cert. denied on other grounds*, 122 S. Ct. 2591 (2002)[7]; *Arknasas Dept. of Educ. v. Jim C.*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000)(en banc), *cert. denied, sub nom. Jim C. v. Arkansas Dept. of Educ.*, 533 U.S. 949 (2001); *Cherry v. Univ. of Wis. Sys. Bd. of Regents*, 265 F.3d 541 (7th Cir. 2001); *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000)(Title IX); *Sandoval v. Hagan*, 197 F.3d 484, 493-494 (11th Cir. 1999)(Title VI), *rev'd on other grounds, sub nom., Alexander v. Sandoval*, 532 U.S. 275 (2001); *Kansas v. U.S.*, 531 U.S. 1035 (2000) (denying petition for *certiorari* by state claiming that Spending Clause statute was unconstitutionally coercive); *George Mason University v. Litman*, 186 F.3d 544, 554 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000) (Congress succeeded in its effort to codify a clear, unambiguous and unequivocal condition of waiver of Eleventh Amendment immunity in 42 U.S.C. § 2000d-7(a)(1));

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[6] The Ninth Circuit Court of Appeals again rejected the state's claim of sovereign immunity under the Eleventh Amendment from Section 504 damage awards in *Lovell v. Chandler*, __ F.3d __, 2002 WL 2022140, *7-8 (9th Cir., Sept. 5, 2002).

[7] Petitioners cite the dissent in *Douglas* in support of their assertion that there is a split among the circuits. Pet. App. at 2, 7. They have presented no legal authority, however, that dissenting opinions can create the kind of split in authority between circuits that this Court would need to resolve.

Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997), *cert. denied, sub nom. Wilson v. Armstrong*, 524 U.S. 937 (1998); *In re Innes*, 184 F.3d 1275, 1282-83 (10th Cir. 1999)(dictum), *cert. denied*, 529 U.S. 1037 (2000); *Board of Educ. v. Kelly E.*, 207 F.3d 931, 935 (7th Cir. 2000), *cert. denied*, 531 U.S. 821 (2000) (finding clear waiver of the Eleventh Amendment under the Individuals with Disabilities Act, the court stated states must take the bitter with the sweet; having accepted the money, they must litigate in federal court.).

Petitioners are wrong in asserting that *Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn*, 280 F.3d 98, 115 at n.5 (2d Cir. 2001), reached a contrary conclusion. Indeed, the *Garcia* court expressly noted that *Jim C.* and *Clark v. California* focused exclusively on whether Congress clearly expressed its intention to condition waiver on the receipt of funds and whether the state, in fact, received the funds, not on whether the state, in accepting the funds, believed it was actually relinquishing its right to sovereign immunity. It agreed with the other courts of appeals that Section 2000d-7 "constitutes a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of its Eleventh Amendment immunity." *Id.* at 113.[8] Thus, the State of Hawai`i was clearly and repeatedly forewarned – and actually knew – that its decision to accept federal funds subjected it to suit for money damages under Section 504.

The contract-like analysis uniformly applied by the courts of appeal, including the Ninth Circuit in this case, is in accord with this Court's analysis and decision in *Barnes v. Gorman*, 122 S. Ct. 2097 (2002). In *Barnes*, the plaintiff sued

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[8] *Garcia* stands alone in federal jurisprudence in creating a patchwork of coverage for Section 504, holding that the waiver for Section 504 claims was effective until Title II went into effect and then lost its effectiveness until some point in the late 1990's when a "colorable basis for a state to suspect" that Congress lacked the power to abrogate Eleventh Amendment immunity in passing Title II of the ADA. *Garcia*, 280 F.3d at 114 n.4. No other circuit court has ruled on this issue one way or another, though the Court of Appeals for the Third Circuit implicitly rejected the *Garcia* holding, noting that the ADA was not enacted to alter existing cause of action. *Koslow, supra* at n 12. Most certainly the court of appeals did not reach this issue in the instant proceeding.

local police officials for violating the ADA and Section 504 by failing to maintain appropriate policies for the transportation of persons with spinal injuries. A jury awarded Mr. Gorman compensatory and punitive damages. The district court vacated this award for punitive damages on the grounds that punitive damages are unavailable in suits brought under the ADA and Section 504.

On appeal, the Eighth Circuit reversed, finding that punitive damages are available under the "general rule" of *Franklin v. Gwinnett County Sch.*, 503 U.S. 60 (1992). This Court reversed the Eighth Circuit and ruled that punitive damages are not available in suits brought under the Title II of the ADA and Section 504. This Court recognized the links between Title II, Section 504 and "the remedies...set forth in Title VI [of the Civil Rights Act of 1964]" and found these remedies to be coextensive with those remedies set forth for private causes of action under Title VI. *Barnes*, 122 S.Ct. at 2100. This Court then acknowledged that Title VI invoked the Spending Clause power under the United States Constitution, Art. I, §8, cl. 1., to place conditions on the grant of federal funds to the states. *Ibid.*

Furthermore, the Court described the relationship between Title VI, the Spending Clause and the funding recipient as "much in the nature of contract: In return for federal funds the [recipients] agree to comply with federally imposed conditions." *Ibid.* The core of the Congress's use of the Spending Power is whether or not Congress has unambiguously imposed a condition and whether the recipient voluntarily and knowingly accepts the terms. *Ibid.* Finding the contract law analogy useful, this Court applied the same analogy to decide that a recipient under Title VI is generally on notice that the recipient is subject "not only to those remedies provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract." *Id.* at 2101. Viewing the imposition of punitive damages as beyond one of reasonable expectation of a Title VI recipient, because it created liability of "indeterminate magnitude," this Court concluded that punitive damages were not reasonably within the contemplation of the parties. Because punitive damages are not available in Title VI cases,

they were, therefore, unavailable under Section 202 of the ADA and Section 504 of the Rehabilitation Act. *Id.* at 2103.

The court of appeals decision in this case foreshadowed this contract-type analysis of this Court and is entirely consistent with it. The Ninth Circuit employed the simple contract approach to the State of Hawai`i's acceptance of federal financial assistance—the state accepted the monies on certain clear conditions, one of them being a waiver of the Eleventh Amendment immunity. The Ninth Circuit, using exactly the *Barnes* analysis and approach, simply reminded the State of Hawai`i of its pre-existing obligation to waive the sovereign immunity provided by the Eleventh Amendment when it applied for and received federal funds. Review of that decision is certainly not warranted, because the Ninth Circuit acted well within this Court's decisions in *New York v. U.S.*, *supra* and *South Dakota v. Dole*, 483 U.S. 203 (1987).

III. THERE IS NO MERIT TO PETITIONERS' CONTENTION (PET. 20-23) THAT A CLEAR STATEMENT BY CONGRESS REGARDING THE AVAILABILITY OF A PRIVATE CAUSE OF ACTION IS A PREREQUISITE TO A STATE WAIVING ITS SOVEREIGN IMMUNITY.

Again, petitioners below did not present this argument, and the court of appeals did not address it. In any event, the contention is without merit. In 1978, after this Court recognized a private right of action to enforce rights under the federal financial statutes,[9] Congress amended the Rehabilitation Act by adding a provision (§ 505) clarifying the procedures and remedies applicable to Section 504. Pub.L.No. 95-602, 92 Stat. 2955. It provides that "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance *** under section 794 of this title." 29 U.S.C. §794a(a)(2).

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[9] See, e.g., *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704-05 (1979).

In enacting Title VI, Title IX, and Section 504 of the Rehabilitation Act, Congress did not expressly provide for a private cause of action. This Court, however, has ruled that implied rights of action exist under Title IX (*Cannon v. Univ. of Chicago*, 441 U.S. 677, 704-05 (1979)); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (Title IX gives a student an implied right of action for sexual harassment by a teacher in such a program, provided the program's officials have "actual notice of, and [have been] deliberately indifferent to, the teacher's misconduct." *Id.* at 274.) and Title VI (*Guardians Ass'n v. Civil Serv. Comm'n of City of New York*, 463 U.S. 582 (1983)). *See also Barnes*, 122 S. Ct. at 2101 ("A funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract. Thus we have held that under Title IX, which contains no express remedies, a recipient of federal funds is nevertheless subject to suit for compensatory damages and injunction, forms of relief traditionally available in suits for breach of contract." (Citations omitted.))

The provisions of the Rehabilitation Act at issue here are just as precise as those found to constitute a valid waiver of the federal government's immunity in *Lane*: "The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available *to any person aggrieved by any act or failure to act by any recipient of Federal assistance* *** under section 794 of this title." 29 U.S.C. §794a(a)(2). (Emphasis added). Petitioners have not, and cannot, point to any language in the statute akin to the "executive agency"/"Federal provider"-type language which created the ambiguity in *Lane*.

Furthermore, contrary to petitioners' claims (Pet. at 22), *Pennhurst I*, *Alden* and *College Savings* do not require a more clear statement of waivers of immunity than approved by this Court in *Lane* and as present here. For instance, in *Alden v. Maine*, 527 U.S. 706, 755 (1999), the Court specifically noted "the Federal Government [does not] lack the authority or means to seek the States' voluntary consent

to private suits. Cf. *South Dakota v. Dole*, 483 U.S. 203 * * * (1987)."[10] Similarly, in *College Savings Bank v. Florida Prepaid Post Secondary Educ. Expense Bd.*, 527 U.S. 666 (1999) the Court recognized that an "unequivocal" waiver of a state's sovereign immunity was consititutionally possible, 527 U.S. at 680-81, reaffirming the holding of *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959) that Congress could condition the exercise of one of its Article I powers (the approval of interstate compacts). *Id.* at 686.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[10] *Alden* involved a state's immunity from suit in its own courts, and did not involve the receipt of federal funds under the Rehabilitation Act.

Supreme Court, U.S.
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No. 01-1878

In the Supreme Court of the United States

STATE OF HAWAII, ET AL., PETITIONERS

v.

BRIAN VINSON AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners are subject to suit for damages for disability discrimination under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, because they waived their Eleventh Amendment immunity when they applied for and accepted federal financial assistance.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Alden v. *Maine*, 527 U.S. 706 (1999)	6
Alexander v. *Choate*, 469 U.S. 287 (1985)	16
Alexander v. *Sandoval*, 532 U.S. 275 (2001)	18, 19
Ardestani v. *INS*, 502 U.S. 129 (1991)	14
Atascadero State Hosp. v. *Scanlon*, 473 U.S. 234 (1985)	2, 16
Barnes v. *Gorman*, 122 S. Ct. 2097 (2002)	2, 9, 16, 18, 19
Board of Trustees of the Univ. of Ala. v. *Garrett*, 531 U.S. 356 (2001)	4
Brown v. *North Carolina Div. of Motor Vehicles*, 987 F. Supp. 451 (E.D.N.C. 1997), aff'd, 166 F.3d 698 (4th Cir. 1999), cert. denied, 531 U.S. 1190 (2001)	11
Campbell v. *Kruse*, 434 U.S. 808 (1977)	16
Cannon v. *University of Chicago*, 441 U.S. 677 (1979)	18, 19
Cherry v. *University of Wis. Sys. Bd. of Regents*, 265 F.3d 541 (7th Cir. 2001)	6
City of Boerne v. *Flores*, 521 U.S. 507 (1997)	10-11
City of Newport v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981)	14
Clark v. *California*, 123 F.3d 1267 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998)	7
College Sav. Bank v. *Florida Prepaid Post-secondary Educ. Expense Bd.*, 527 U.S. 666 (1999)	6, 9

Cases—Continued: Page

Douglas v. *California Dep't of Youth Auth.*, 271 F.3d 812, as amended, 271 F.3d 910 (9th Cir. 2001), cert. denied, 122 S. Ct. 2591 (2002) 5, 6-7
FDIC v. *Meyer*, 510 U.S. 471 (1994) 13
Franconia Assocs. v. *United States*, 122 S. Ct. 1993 (2002) 14, 17
Franklin v. *Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992) 18
Garcia v. *State Univ. of New York Health Scis. Ctr.*, 280 F.3d 98 (2d Cir. 2001) 7, 9, 10
Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 14
Honig v. *Students of the Cal. Sch. for the Blind*, 471 U.S. 148 (1985) 16
Hoover v. *Ronwin*, 466 U.S. 558 (1984) 17
Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990) 14
Jim C v. *United States*, 235 F.3d 1079 (8th Cir. 2002), cert. denied, 533 U.S. 949 (2001) 7
Lane v. *Pena*, 518 U.S. 187 (1996) 12, 15, 16, 19
Lapides v. *Board of Regents of the Univ. Sys. of Ga.*, 122 S. Ct. 1640 (2002) 9
Litman v. *George Mason Univ.*, 186 F.3d 544 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000) 7
Lovell v. *Chandler*, No. 98-16545, 2002 WL 2022140 (9th Cir. Sept. 5, 2002) 7
Nihiser v. *Ohio EPA*, 979 F. Supp. 1168 (S.D. Ohio 1997), aff'd in part and rev'd in part, 269 F.3d 626 (6th Cir. 2001), cert. denied, 122 S. Ct. 2588 (2002) 7, 11
Ohio EPA v. *Nihiser*, cert. denied, 122 S. Ct. 2588 (2002) 6
Olmstead v. *L.C.*, 527 U.S. 581 (1999) 2
Pederson v. *Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000) 7
Pennhurst State Sch. & Hosp. v. *Halderman*:
451 U.S. 1 (1981) 20
465 U.S. 89 (1984) 8

Cases—Continued: Page

Pennsylvania Dep't of Corrs. v. *Yeskey*, 524 U.S. 206 (1998) 11
Regents of the Univ. of Cal. v. *Bakke*, 438 U.S. 265 (1978) 19
Robinson v. *Kansas*, 295 F.3d 1183 (10th Cir. 2002) 6
Sandoval v. *Hagan*, 197 F.3d 484 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001) 7
Seminole Tribe v. *Florida*, 517 U.S. 44 (199€) 10, 13
Stanley v. *Litscher*, 213 F.3d 340 (7th Cir. 2000) 7
United States v. *Gonzales*, 520 U.S. 1 (1997) 16
United States v. *Lovasco*, 431 U.S. 783 (1977) 17
United States v. *United Foods, Inc.*, 533 U.S. 405 (2001) 17
United States v. *Williams*, 514 U.S. 527 (1995) 17
Vermont Agency of Natural Res. v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) 14
Will v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989) 14
Young, Ex parte, 209 U.S. 123 (1908) 16

Constitution, statutes and rule:

U.S. Const.:
Art. I, § 8, Cl. 1 (Spending Clause) 6, 12
Amend. XI 2, 3, 4, 6, 11, 13, 14, 16, 18
Age Discrimination Act of 1975, 42 U.S.C. 6101 *et seq.* 2
Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*:
Tit. I, 42 U.S.C. 12111 *et seq.* 4
Tit. II, 42 U.S.C. 12131 *et seq.* 3, 5, 7, 8, 10, 11-12, 19
42 U.S.C. 12131 note 10
Tit. V, 42 U.S.C. 12201 *et seq.*:
42 U.S.C. 12201(b) 8
Civil Rights Act of 1964, Tit. VI, 42 U.S.C. 2000d *et seq.* 2, 15, 18, 19
42 U.S.C. 2000d-7 ..... *passim*

Statutes and rule—Continued: Page

42 U.S.C. 2000d-7(a) 2, 6
42 U.S.C. 2000d-7(a)(1) 13, 14, 15, 18
42 U.S.C. 2000d-7(a)(2) 13, 14, 15, 16
Education Amendments of 1972, Tit. IX, 20 U.S.C. 1681 *et seq.* 2, 15
Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*:
§ 504, 29 U.S.C. 794 ..... *passim*
§ 504(a), 29 U.S.C. 794(a) 1-2
§ 505, 29 U.S.C. 794a 19
§ 505(a), 29 U.S.C. 794a(a) 2, 19
§ 505(a)(2), 29 U.S.C. 794a(a)(2) 18, 19
§ 505(b), 29 U.S.C. 794a(b) 19
Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003(a), 100 Stat. 1845 2
28 U.S.C. 2403(a) 4
Fed. R. App. P. 35(c) 12

Miscellaneous:

132 Cong. Rec. 28,623 (1986) 17
Restatement (Second) of Contracts (1981) 9
S. Rep. No. 388, 99th Cong., 2d Sess. (1986) 17
Webster's Third New International Dictionary (1976) 16

In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 288 F.3d 1145. The opinion of the district court (Pet. App. 31a-75a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 2002. The petition for a writ of certiorari was filed on June 20, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 504(a) of the Rehabilitation Act of 1973 prohibits any "program or activity receiving Federal financial assistance" from "subject[ing any person] to discrimination" on the basis of disability. 29 U.S.C.

794(a). Individuals have a private right of action for damages against entities that receive federal funds and violate that prohibition. See 29 U.S.C. 794a(a); *Barnes* v. *Gorman*, 122 S. Ct. 2097 (2002); *Olmstead* v. *L.C.*, 527 U.S. 581, 590 n.4 (1999).

In 1985, this Court held that Section 504 was not clear enough to evidence Congress's intent to condition federal funding on a waiver of Eleventh Amendment immunity for private damage actions against state entities. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246 (1985). In response to *Atascadero*, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003(a), 100 Stat. 1845. Section 2000d-7(a) provides:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 *et seq.*], the Age Discrimination Act of 1975 [42 U.S.C. 6101 *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d *et seq.*], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

2. Respondent Brian Vinson was injured on the job and was unable to continue performing his work with a flooring company. He received workers' compensation benefits, including vocational rehabilitation benefits from his employer's workers' compensation insurance carrier. The carrier determined that a two-year college program would be an important element of respondent's vocational rehabilitation. Respondent had dyslexia, an impairment that can limit one's ability to read and learn. The insurance ~~carrier~~ determined that respondent's dyslexia would not impede his success in a college program, but that it might require him to spend more than two years to complete the program. Respondent enrolled in a community college, but took a lighter-than-ordinary course load because of his learning disability. Pet. App. 3a-4a, 10a-11a.

The insurance carrier sought approval from petitioners Hawaii Department of Labor and Industrial Relations and Alice Thomas, its vocational rehabilitation supervisor, for state funding for the rehabilitation plan. Petitioners denied the request for state-funded schooling because of the reduced course load, despite respondent's assertion that the lesser course load was needed to accommodate his dyslexia. Pet. App. 4a-5a, 8a.

Respondent filed suit in district court, alleging that petitioners' conduct violated, *inter alia*, Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.*, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and state law. On petitioners' motion for summary judgment, the district court entered judgment for petitioners on the federal claims on the merits, Pet. App. 44a-72a, and on the state law claim on Eleventh Amendment grounds, *id.* at 72a-74a. Although petitioners had not claimed Eleventh Amend-

ment immunity to suit from the federal claims (*id.* at 44a), the district court held in the alternative, and without discussion of Section 2000d-7, that "the Eleventh Amendment bars suit against [petitioners] to the extent Plaintiff's other claims would require money damages against the state." *Id.* at 74a n.14.[1]

3. Petitioners briefly raised the issue of Eleventh Amendment immunity to the Section 504 claim for the first time in the initial round of briefing on appeal. They addressed it briefly in their statement regarding jurisdiction, but acknowledged that the Ninth Circuit had previously rejected a claim of state immunity to a Section 504 claim. Pet. C.A. Br. 1-3. After this Court held in *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), that Congress did not validly abrogate States' immunity to suits alleging disability discrimination in employment under Title I of the ADA, 42 U.S.C. 12111 *et seq.*, the court of appeals requested supplemental briefing on the Eleventh Amendment issue. The United States then intervened on appeal, pursuant to 28 U.S.C. 2403(a), solely to defend the constitutionality of the provision conditioning the States' receipt of federal funding on the waiver of Eleventh Amendment immunity. The

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[1] Respondent initially sought injunctive relief, as well as damages. Pet. App. 34a. The district court granted a preliminary injunction ordering petitioners to conduct a "self-evaluation" as required by Disabilities Act regulations, and vacated that injunction two years later after it had concluded petitioners were in compliance with the regulations. *Id.* at 35a. The district court declined to order that petitioners grant respondent the benefits he requested in light of evidence that, subsequent to the filing of the suit, petitioners had granted him those benefits. *Id.* at 8a-9a, 35a-36a, 42a-43a.

court of appeals affirmed in part and reversed in part. Pet. App. 1a-30a.

With regard to the Section 504 claim, the court followed (Pet. App. 2a, 9a) its recent decision in *Douglas* v. *California Department of Youth Authority*, 271 F.3d 812, as amended, 271 F.3d 910 (9th Cir. 2001), cert. denied, 122 S. Ct. 2591 (2002). *Douglas* held that "Congress may exercise its spending power to condition the grant of federal funds upon the states' agreement to waive Eleventh Amendment immunity." *Id.* at 820 n.5. Examining the plain language of 42 U.S.C. 2000d-7, *Douglas* concluded that Congress had used "clear waiver language" that "conditions the receipt of federal funds under the Rehabilitation Act upon a state's agreement to forgo the Eleventh Amendment defense." 271 F.3d at 820-821. Because it was undisputed in this case that petitioners "accepted federal Rehabilitation Act funds," the court concluded that petitioners "waived [their] Eleventh Amendment immunity as to [respondent's] claim under section 504 of the Rehabilitation Act." Pet. App. 2a, 9a. On reaching the merits of respondent's Section 504 claim, the court found that, because there remained issues of material fact in dispute, the district court had improperly entered summary judgment. *Id.* at 9a-16a.[2]

Judge O'Scannlain concurred in part and dissented in part. Pet. App. 20a-30a. Although disagreeing with the court's determination that petitioners had waived their immunity to Section 504 claims by accepting federal financial assistance, he concurred in the opinion's holding on that point because the panel was bound by *Douglas*. *Id.* at 22a. On the merits, Judge O'Scannlain

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[2] Respondent abandoned his claim of discrimination under Title II of the ADA at oral argument. Pet. App. 2a n.1.

would have affirmed the grant of summary judgment, and he thus dissented from the court's judgment. *Id.* at 24a-30a.

ARGUMENT

The decision of the court of appeals is correct and does not raise a significant or sustained conflict with any decision of any other court of appeals. This Court recently denied a petition for a writ of certiorari in *Ohio Environmental Protection Agency* v. *Nihiser*, 122 S. Ct. 2588 (2002) (No. 01-1357), which advanced some of the same arguments regarding the same statute. Accordingly, further review is not warranted.

1. Section 2000d-7(a) of Title 42 provides that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973." Petitioners do not dispute (Pet. 10) that Congress has the power under the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, to condition the receipt of federal financial assistance on a State's waiver of its Eleventh Amendment immunity to Section 504 claims. See *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999); *Alden* v. *Maine*, 527 U.S. 706, 755 (1999). And petitioners acknowledge (Pet. 18) that the language of Section 2000d-7 was effective in putting them on clear notice that acceptance of federal funds would constitute a waiver of immunity to suit under Section 504.[3]

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[3] That is the consensus of the courts of appeals. See *Robinson* v. *Kansas*, 295 F.3d 1183 (10th Cir. 2002); *Cherry* v. *University of Wis. Sys. Bd. of Regents*, 265 F.3d 541, 554-555 (7th Cir. 2001); *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820, as amended, 271 F.3d 910 (9th Cir. 2001), cert. denied, 122 S. Ct. 2591

Petitioners nonetheless contend (Pet. 11-15) that their waiver of immunity to suits under Section 504 was not "knowing" because of congressional action regarding States' immunity from suit under a different anti-discrimination statute, Title II of the ADA, 42 U.S.C. 12131 *et seq.* For that proposition, petitioners rely primarily on the Second Circuit's decision in *Garcia* v. *State University of New York Health Sciences Center*, 280 F.3d 98 (2001). The Second Circuit agreed with the other courts of appeals, see note 3, *supra*, that Section 2000d-7 "constitutes a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of its Eleventh Amendment immunity." *Id.* at 113. And it further agreed that, under normal circumstances, "the acceptance of funds conditioned on the waiver might properly reveal a knowing relinquishment of sovereign immunity." *Id.* at 114 n.4. But the Court nonetheless held that the State's acceptance of clearly-conditioned funds "alone is not sufficient for us to find that New York actually waived its sovereign immunity in accepting federal funds" in that case. *Id.* at 113-114. Instead, the Second Circuit believed that courts must also consider "whether the state, in accepting the funds,

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(2002); *Nihiser* v. *Ohio EPA*, 269 F.3d 626 (6th Cir. 2001), cert. denied, 122 S. Ct. 2588 (2002); *Jim C.* v. *United States*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 876 (5th Cir. 2000); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Sandoval* v. *Hagan*, 197 F.3d 484, 493-494 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 550-551 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000); *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998). See also *Lovell* v. *Chandler*, No. 98-16545, 2002 WL 2022140, at *7-*8 (9th Cir. Sept. 5, 2002).

believed it was actually relinquishing its right to sovereign immunity." *Id.* at 115 n.5. The Court held that that additional requirement was not satisfied because, at the time the State accepted funds, "Title II of the ADA was reasonably understood to abrogate's New York's sovereign immunity." *Id.* at 114. The court reasoned that, because "the proscriptions of Title II and § 504 are virtually identical, a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits, * * * since by all reasonable appearances state sovereign immunity had already been lost." *Ibid.* (citation omitted).

The Second Circuit's conclusion about what constitutes a knowing waiver is incorrect, for several reasons. First, it is wrong because, since the enactment of Section 2000d-7 in 1986, the plain text of that provision has informed every state agency that acceptance of federal funds constitutes a waiver of immunity to suit for violations of Section 504. Section 504 was not amended or altered by the enactment of Title II of the ADA in 1990, and it has always been clear that plaintiffs could sue under either statute. See 42 U.S.C. 12201(b) (preserving existing causes of action). A state agency that accepted federal funds thus would have known since 1986 that it was giving up any immunity defense it might have to suit under Section 504, regardless of whether it retained immunity from suit under a distinct statute—the ADA—that imposed similar substantive obligations. Cf. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 103 n.12 (1984) (immunity must be assessed on a claim-by-claim basis).

More generally, the court in *Garcia* erred in concluding that acceptance of clearly-conditioned federal funds may be insufficient to find that a State has

waived its immunity. Under this Court's precedents, the existence of a waiver turns on the State's objective manifestation of assent by accepting clearly-conditioned funds.[4] See, *e.g.*, *College Sav. Bank*, 527 U.S. at 686 (holding that "acceptance of the funds entails an agreement" to funding conditions); *id.* at 678 n.2 ("[A] waiver may be found in a State's acceptance of a federal grant."). The Second Circuit's attempt to add an additional, subjective component to the analysis conflicts with this Court's recent teaching in *Lapides* v. *Board of Regents of the University System of Georgia*, 122 S. Ct. 1640, 1643 (2002). In that case, this Court held that the State of Georgia's removal of a case to federal court was "a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's" immunity, even though the State clearly had no subjective intention of "actually relinquishing its right to sovereign immunity," *Garcia*, 280 F.3d at 115 n.5, because it did not believe that removal amounted to a waiver of immunity. 122 S. Ct. at 1645-1646. In so doing, this Court specifically rejected the State's request to examine the State's subjective beliefs and reasons in determining whether the State's actions amounted to an unequivocal waiver. *Id.* at 1644-1645. "Motives are difficult to evaluate, while jurisdictional rules should be clear." *Id.* at 1645. Moreover, the Court concluded in *Lapides* that removal waived the State's sovereign immunity, even though, before the

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[4] This is consistent with basic contract law principles which ordinarily turn on manifestation of assent. See Restatement (Second) of Contracts §§ 2, 18 (1981); cf. *Barnes* v. *Gorman*, 122 S. Ct. 2097, 2101 (2002) (observing that the Court has "regularly applied the contract-law analogy in cases defining the scope of conduct for which funding recipients may be held liable for money damages").

Lapides decision, the State may have had doubts whether removal would constitute such a waiver. *Garcia* requires courts to engage in the difficult evaluation of States' subjective beliefs and motives, in conflict with the clear jurisdictional rule established in this Court's prior cases.

In any event, it is apparent that the differences between the Second Circuit's position in *Garcia* and the position of the other courts—including the court of appeals in this case—that have addressed similar claims is simply a dispute over a transitional rule that will, in short order, be of no further consequence. *Garcia* held that the waiver for Section 504 claims was effective before Title II went into effect in 1992, see 42 U.S.C. 12131 note, then lost its effectiveness when Title II took effect, and then regained its full effectiveness once again at some point in the late 1990's when it became clear that Congress's attempted abrogation of sovereign immunity in Title II of the ADA was subject to doubt. The on-again, off-again pattern of waivers that results from *Garcia* provides a substantial basis for doubting the validity of the underlying analysis in that case. But it also, at a minimum, deprives petitioners' asserted conflict with *Garcia* of any meaningful long-term effect. Contrary to petitioners' contention (Pet. 12), the Second Circuit's opinion makes clear that at the point when there was a "'colorable basis' for the State[ ] to suspect" that it had retained its immunity to suit, the waiver for Section 504 became effective again "because a state deciding to accept the funds would not be ignorant of the fact that it was waiving its possible claim to sovereign immunity." *Garcia*, 280 F.3d at 114 n.4. That point presumably occurred, at the latest, in 1997, after this Court's decisions in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and *City of Boerne* v.

Flores, 521 U.S. 507 (1997). After *Seminole Tribe*, and even more so in response to *City of Boerne*, States around the country began challenging the validity of Title II's abrogation, and some courts were accepting those arguments. See, *e.g.*, *Brown* v. *North Carolina Div. of Motor Vehicles*, 987 F. Supp. 451 (E.D.N.C. 1997), aff'd, 166 F.3d 698 (4th Cir. 1999), cert. denied, 531 U.S. 1190 (2001); *Nihiser* v. *Ohio EPA*, 979 F. Supp. 1168 (S.D. Ohio 1997), aff'd in part and rev'd in part, 269 F.3d 626 (6th Cir. 2001), cert. denied, 122 S. Ct. 2588 (2002). Indeed, by March 1998, 33 States (including petitioner Hawaii) filed an amicus brief in this Court arguing that *City of Boerne* made it "doubtful" that Congress could have validly abrogated States' Eleventh Amendment immunity to suits under Title II of the ADA. Brief of Amici Curiae State of Nevada et al. at 10, *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206 (1998) (No. 97-634).

Under the rationale of the Second Circuit's decision in *Garcia*, state departments or agencies that accepted funds after (at the latest) 1997 knowingly waived their immunity. Accordingly, in the Second Circuit, as in every other circuit that has addressed the issue, state departments or agencies that accepted federal funds after 1997 and state departments or agencies that accept federal funds in the future are subject to suit under Section 504. There is accordingly unanimity in the circuits regarding the validity of States' waiver of immunity to Section 504 suits for most cases currently being litigated and for all cases that will arise in the future. The dispute between the Second Circuit's view and that of the other courts of appeals affects at most the small and steadily decreasing number of pending Section 504 cases against States seeking monetary damages that arose between the effective date of Title

II of the Disabilities Act in 1992 and (at the latest) 1997. Further review is therefore not warranted.

2. Petitioners further contend (Pet. 16-20) that Section 2000d-7's waiver of immunity does not extend to *damages*. That argument appears to have been briefly brought before the panel, embedded in petitioners' now-abandoned argument that Congress lacked authority to enact Section 504 under the Spending Clause in a supplemental letter brief filed by petitioners in response to the Court's request for briefing on the effects of *Garrett* on the appeal. Perhaps because of its cursory presentation in petitioners' supplemental brief, the court of appeals did not expressly address the issue and petitioners did not seek further review through a petition for rehearing.[5] Moreover, despite their contention (Pet. 16-20) that their claim follows directly from *Lane* v. *Pena*, 518 U.S. 187 (1996), petitioners have not pointed to any decision by any court in the last six years that has adopted, or even addressed, the claim that they now press. This Court should not grant further review to address such a question of first impression, before there has developed any division of authority—or even any discussion of the issue—in the courts of appeals.

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[5] After oral argument, but before the court of appeals issued a decision, petitioners submitted a premature Petition for Rehearing En Banc in which they more clearly raised their claim that Section 2000d-7's waiver of immunity does not extend to damages. Citing Federal Rule of Appellate Procedure 35(c), concerning the timing of petitions for en banc review, the court ordered that the petition "not be filed" and provided that if petitioners "wish to file a petition for rehearing en banc after the panel decision in this case is filed, they may do so." 12/4/01 Order 1-2. After the panel decision was filed, petitioners did not seek either panel or en banc rehearing.

In any event, petitioners' contention (Pet. 18) that Section 2000d-7 "does not 'unambiguously' state that any waiver of sovereign immunity would extend to suits for money damages" is mistaken. Section 2000d-7(a)(1) provides that States "shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504." The Eleventh Amendment is an immunity from suit for any form of relief, equitable or legal. See *Seminole Tribe* v. *Florida*, 517 U.S. 44, 58 (1996). By waiving their "Eleventh Amendment" immunity, then, petitioners waived their immunity to suit for any form of relief. No separate mention of damages is required, because the statute is clear that they have waived all their immunity derived from or reflected in the Eleventh Amendment. Just as a "sue and be sued" clause deprives a federal entity of any remnant of its sovereign immunity to damage actions, see *FDIC* v. *Meyer*, 510 U.S. 471, 480 (1994) (so holding and collecting cases), Section 2000d-7(a)(1)'s total relinquishment of sovereign immunity demands that petitioners be treated for purposes of immunity as if they were private entities.

Section 2000d-7(a)(2) does not, as petitioners assert (Pet. 18), serve as a limit on the waiver. That Section provides:

> In a suit against a State for a violation of [Section 504 and other specified civil rights statutes], remedies (including remedies both at law and in equity), are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

As the caption of Section 2000d-7 ("Civil rights remedies equalization") indicates, Section 2000d-7(a)(2) is intended to "equaliz[e]" the "remedies" available against a state defendant. Section 2000d-7(a)(2) is not a response to sovereign immunity (which is entirely removed by subsection (a)(1)), but to the myriad other rules *apart* from the Eleventh Amendment that reflect the special status of States (but not other public and private entities) in the federal system. See, *e.g*, *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 787 (2000); *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991); *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989). Congress enacted this subsection in order to eliminate any possibility that those other rules might limit the remedies available against States even when sovereign immunity was removed. Cf. *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981) (common law presumption against punitive damage awards against governmental entities). Thus, in determining the meaning of Section 2000d-7(a)(2), no "clear statement" rule is required because it does not state a condition of waiver of sovereign immunity, but rather provides a rule of construction.

Moreover, even if Section 2000d-7(a)(2) were part of a waiver of sovereign immunity, this Court has held that once it is clear a waiver exists, the waiver's scope is determined by a "realistic assessment of legislative intent." *Franconia Assocs.* v. *United States*, 122 S. Ct. 1993, 2003 (2002) (quoting *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95 (1990)); see *Ardestani* v. *INS*, 502 U.S. 129, 137 (1991) ("[O]nce Congress has waived sovereign immunity over a certain subject matter, the Court should be careful not to 'assume the authority to narrow the waiver that Congress in-

tended.'"). Section 2000d-7(a)(2) provides that a plaintiff may recover "remedies both at law and in equity" against a State "to the same extent as such remedies are available for such a violation in the suit against *any* public or private entity other than a State" (emphasis added). Petitioners' primary assertion (Pet. 18-19) is that the term "public entity" refers to both local governments (such as cities and school districts, which are governed by Section 504, Title VI of the Civil Rights Act of 1964 (29 U.S.C. 794), Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*), and other federal statutes that "prohibit[] discrimination by recipients of Federal financial assistance," 42 U.S.C. 2000d-7(a)(1)) *and* the federal government (which is governed only by Section 504). As we explained in our brief in *Lane*, we do not believe that is the best reading of the statute. See 518 U.S. at 199 (describing as "plausible" the United States' argument that the term "public entity" refers to "'the non-federal public entities receiving federal financial assistance that are covered by' each of the statutes to which § [2000d-7(a)(1)] refers"). By using a disjunctive and broad reference to any public or private entity, the provision makes the remedies against the States the same as those broadly available against other private and public entities. The statute does not easily admit of a reading that focuses on a specific rule limiting remedies against a small subset of certain private or public entities.

But even assuming that the term "public entity" did include the federal government, and further accepting petitioners' contention (Pet. 19) that this provision must be read as providing that only remedies that are available from *both* public and private entities are available from States, that would not foreclose damages against a State. The statute does not use restrictive

terms to require that such damages be available from *every* public entity, but rather uses expansive terms, referring to "any" public entity. See *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" (quoting *Webster's Third New International Dictionary* 97 (1976)). It is well-established that damages are generally available against all private entities and most public entities (such as cities and school districts). See *Barnes*, 122 S. Ct. at 2100-2101. Moreover, *Lane* itself made clear that the federal government could be sued for damages for violations of Section 504 when it was sued for its actions as a "provider" of federal funds. See 518 U.S. at 193. Therefore, damages *are* available against every public entity, both federal and local, in at least some circumstances. Suits against the States for damages thus fall plainly within the text of Section 2000d-7(a)(2), even if read as narrowly as petitioners advocate.

Petitioners' contention—that their Eleventh Amendment immunity is removed by Section 2000d-7, but no damages are available—would make the statute a practical nullity. *Ex parte Young*, 209 U.S. 123 (1908), permits suits against state officials for prospective injunctive relief, and nothing in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 235 (1985), which addressed suits for "retroactive monetary relief," drew the availability of a suit for injunctive relief against state officials into question. Cf. *Honig* v. *Students of the Cal. Sch. for the Blind*, 471 U.S. 148 (1985) (same); *Alexander* v. *Choate*, 469 U.S. 287 (1985) (suit under Section 504 against state official in official capacity for injunctive relief); *Campbell* v. *Kruse*, 434 U.S. 808 (1977) (same). In enacting Section 2000d-7 in response

to *Atascadero*, Congress was cognizant of the availability of *Ex parte Young* and knew that as a practical matter only damage remedies had been precluded by *Atascadero*. See 132 Cong. Rec. 28,623 (1986) (Sen. Cranston); S. Rep. No. 388, 99th Cong., 2d Sess. 27-28 (1986). Yet petitioners contend that Section 2000d-7 permits no remedies other than what was already available under *Ex parte Young*. It would be absurd to attribute such an intent to Congress. Cf. *United States* v. *Williams*, 514 U.S. 527, 541 (1995) (Scalia, J., concurring) (the clear statement "rule does not, however, require explicit waivers to be given a meaning that is implausible"). Therefore, if the scope of the waiver is judged by a "realistic assessment of legislative intent," it is clear that Congress intended to make damages available. *Franconia*, 122 S. Ct. at 2003.

3. Finally, petitioners urge (Pet. 20-23) this Court to review whether there is a private right of action against state recipients of federal financial assistance for violations of Section 504. That argument was not pressed by petitioners below nor addressed by the court of appeals.[6] This Court does not ordinarily grant review to consider claims that were neither pressed nor passed upon below. See, *e.g.*, *United States* v. *United Foods, Inc.*, 533 U.S. 405, 416 (2001). Nor have peti-

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[6] Petitioners did press this argument (albeit for the first time) in their premature Petition for Rehearing En Banc. That petition was not accepted for filing, see note 5, *supra*, and petitioners did not file a petition for panel or en banc rehearing after the decision was issued. Thus, petitioners' argument was never submitted in a pleading accepted for filing by the court. Even if the petition had been accepted for filing, the argument would have come too late to preserve it for this Court's review. See, *e.g.*, *Hoover* v. *Ronwin*, 466 U.S. 558, 574 n.25 (1984); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

tioners pointed to any decision of any court of appeals that has addressed the issue. Petitioner's claim is therefore not ripe for review.

In any event, Congress has made plain in the text and structure of the relevant statutes its intent to provide a private right of action against recipients of federal funds, including state recipients, for violations of Section 504. Petitioners insist (Pet. 22) that Section 2000d-7 alone was not sufficient to put them on notice that Congress intended to create a cause of action against States. In essence, their contention reduces to the proposition that Congress clearly expressed its intent that Eleventh Amendment immunity be no bar to a private suit proceeding against a State under Section 504, without expressing any intent as to whether a cause of action existed in the first place. Without the cause of action, however, Section 2000d-7's reference to Section 504 would truly be a nullity. Thus, this Court has consistently held that Section 2000d-7 "ratified *Cannon* [v. *University of Chicago*, 441 U.S. 677 (1979)]'s holding" that a private right of action exists for the statutes identified therein. *Alexander* v. *Sandoval*, 532 U.S. 275, 280 (2001); see *Barnes* v. *Gorman*, 122 S. Ct. 2097, 2100 (2002); *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 72 (1992); *id.* at 78 (Scalia, J., concurring). And since Section 2000d-7(a)(1) is directly targeted at a legal immunity enjoyed by States alone, there can be no doubt that Congress intended States to be defendants to Section 504's private right of action.

In any event, Section 2000d-7 does not stand alone. In 1978, Congress enacted Section 505(a)(2) of the Rehabilitation Act, which provides that the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964, [42 U.S.C. 2000d *et seq.*] shall be available to any person aggrieved by any act or failure

to act by any recipient of Federal assistance * * * under section 794 of this title." 29 U.S.C. 794a(a)(2). It is now "beyond dispute that private individuals may sue to enforce" Title VI, *Alexander*, 532 U.S. at 280, and the same was true at the time Congress enacted Section 505, see *Cannon* v. *University of Chicago*, 441 U.S. 677, 696, 701-703 (1979) (describing legal landscape in 1972); see also *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 419-421 (1978) (opinion of Stevens, J., joined by Burger, C.J., and Stewart & Rehnquist, JJ.) (holding that there is a private right of action to enforce Title VI against a state agency).

By incorporating the "remedies, procedures, and rights" of Title VI, Congress plainly incorporated the existing private right of action to enforce Title VI. See *Barnes*, 122 S. Ct. at 2100 ("Both [Section 504 of the Rehabilitation Act and Title II of the Disabilities Act] are enforceable through private causes of action" as evidenced by the incorporation of "the remedies available in a private cause of action brought under Title VI."). The existence of the private cause of action to enforce Section 504 is also confirmed by the statutory provision authorizing the award of attorneys' fees to a prevailing party (other than the United States) "[i]n any action or proceeding to enforce or charge a violation of a provision of this subchapter." 29 U.S.C. 794a(b); see *Cannon*, 441 U.S. at 699 (attorneys' fees provision "explicitly presumes the availability of private suits"); *Lane*, 518 U.S. at 194 (describing Section 505(b) as "clear waiver of the Federal Government's sovereign immunity").

Petitioners ignore Section 505(a), which expressly incorporates the remedies under Title VI, and Section 505(b), which expressly provides that private parties seeking "to enforce" Section 504 may recover attorneys'

fees. Those provisions, together with section 2000d-7, make clear that recipients, including state recipients, are subject to private suit under Section 504. Thus, even if petitioners are correct (Pet. 22) that implied causes of action for Spending Clause legislation are *in general* "inconsistent" with the clear statement rule of *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), Congress made quite clear through the text and structure of the relevant statutes its intent that Section 504 be enforced against the States through such a cause of action.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

STATE OF HAWAII, *et al.*,

Petitioners,

v.

BRIAN VINSON, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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14 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Alden v. Maine, 527 U.S. 706 (1997) 8

Alexander v. Sandoval, 532 U.S. 275 (2001) 9

Anderson v. Creighton, 483 U.S. 635 (1987)..... 3

Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985)..... 9

Barnes v. Gorman, 122 S. Ct. 2097 (2002) 2, 4

City of Boerne v. Flores, 521 U.S. 507 (1997) 5

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).....2, 4, 10

Douglas v. California Dep't of Youth Auth., 271 F.3d 812 (9th Cir. 2001), *reh'g en banc denied*, 285 F.3d 1226 (9th Cir.), *cert. denied*, 122 S. Ct. 2591 (2002)..... 8

Douglas v. California Dep't of Youth Auth., 285 F.3d 1226 (9th Cir.), *cert. denied*, 122 S. Ct. 2591 (2002).....1, 2, 8

Ex Parte Young, 209 U.S. 123 (1908)..... 8

Franconia Assocs. v. United States, 122 S. Ct. 1993 (2002).....6, 7

Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn, 280 F.3d 98 (2d Cir. 2001) 1, 3, 5

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 3

Hason v. Medical Bd. of Cal., 279 F.3d 1167 (9th Cir.), *reh'g en banc denied*, 294 F.3d 1166 (9th Cir.), *petition for cert. filed*, No. 02-479 (U.S. Sept. 23, 2002)..... 5

TABLE OF AUTHORITIES – Continued

Page

Lane v. Pena, 518 U.S. 187 (1996) 6, 7, 10

Lapides v. Board of Regents of the University Sys. of Georgia, 122 S. Ct. 1640 (2002) 3

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) 6, 8, 9

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 5

United States v. Lanier, 520 U.S. 259 (1997) 5

United States v. Ruiz, 122 S. Ct. 2450 (2002) 4

STATUES, RULES AND REGULATIONS

29 U.S.C. § 794 1

42 U.S.C. § 2000d-7 7

42 U.S.C. § 2000d-7(a)(1) 1, 2, 6

42 U.S.C. § 2000d-7(a)(2) 6, 8

REPLY BRIEF FOR THE PETITIONERS

1. The United States does not deny that the decision below conflicts with the Second Circuit's decision in *Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn*, 280 F.3d 98, 114-15 (2d Cir. 2001). Nor does it dispute the importance, to all fifty States, of the question whether acceptance of federal funds effects a waiver of the States' sovereign immunity against private suits brought under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. Nevertheless, the Government urges the Court to deny review, arguing primarily that *Garcia* was wrongly decided. *See* Brief for the United States in Opposition ("U.S. Br.") at 7-10. As we shall demonstrate, the United States' submission in this regard ignores the safeguards that this Court has established for Spending Clause waivers and rests upon an erroneous suggestion that the rule adopted by the Second Circuit prescribed a subjective test for waiver of sovereign immunity. The Government also attempts to minimize the significance of the circuit split by claiming that the Second Circuit's holding merely established "a transitional rule that will, in short order, be of no further consequence." *Id.* at 10. However, this argument rests on the mistaken notion that *Garcia* applies only to Section 504 claims arising before 1997, *id.* at 10-11; in fact, *Garcia* said no such thing.

a. Echoing the reasoning of the Ninth Circuit and the other courts of appeals it has followed, the United States argues that a waiver of sovereign immunity may be inferred from, without more, (i) the language of 42 U.S.C. § 2000d-7(a)(1) purporting to abrogate Eleventh Amendment immunity in Section 504 cases, and (ii) the acceptance of federal funds. U.S. Br. at 6 & n.3. As both the Second Circuit and Judge O'Scannlain have demonstrated, this Court's cases have required more. *See Garcia*, 280 F.3d at 114; *Douglas v. California Dep't of Youth Auth.*, 285 F.3d 1226, 1228-31 (9th Cir.) (O'Scannlain, J., dissenting from the denial of rehearing en banc), *cert. denied*, 122 S. Ct. 2591 (2002). Specifically,

this Court has emphasized the "fundamental difference between a State's expressing unequivocally that it waives its immunity, and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680-81 (1999);[1] *see also Barnes v. Gorman*, 122 S. Ct. 2097, 2101 (2002) ("Just as a valid contract requires offer and acceptance of its terms, 'the legitimacy of Congress' power to legislate under the spending power . . . rests on whether the [recipient] voluntarily and *knowingly* accepts the terms of the "contract."'") (emphasis added) (citation omitted).

Section 2000d-7(a)(1) speaks only to the latter (i.e., Congress' offer); as to the former (i.e., the effect of the State's action), the Court has laid down three principles that the United States simply ignores: (i) "state sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected," *College Sav. Bank*, 527 U.S. at 682; (ii) "an effective waiver of a constitutional right is the 'intentional relinquishment or abandonment of a *known* right or privilege,'" *id.* (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)) (emphasis added); and (iii) "'[c]ourts indulge in every reasonable presumption *against* waiver' of fundamental constitutional rights," *id.* (quoting *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)) (emphasis added). The Second Circuit and Judge O'Scannlain correctly concluded that application of these principles required analysis of the legal circumstances that existed when the State committed the act

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[1] The Court drew this distinction in the course of rejecting the doctrine of constructive waiver arising from Congress' mere occupation of a field. As Judge O'Scannlain has pointed out, even though " 'constructive waiver' doctrine is not at issue here, . . . the Court's recent teachings on how explicit a State's waiver must be are instructive" in the context of alleged Spending Clause waivers. *Douglas*, 285 F.3d at 1228 (O'Scannlain, J., dissenting from the denial of rehearing en banc).

said to have waived its constitutionally guaranteed immunity. Such an inquiry is necessary to determine whether the acceptance of federal funds reasonably reflected an intentional decision to relinquish a known right.

The United States would blithely abandon this inquiry altogether, disparaging it as an "attempt to add an additional, subjective component to the analysis," U.S. Br. at 9, in conflict with *Lapides v. Board of Regents of the University Sys. of Georgia*, 122 S. Ct. 1640 (2002). In *Lapides*, the Court held that a State's voluntary removal of an action to federal court effects a waiver of its Eleventh Amendment right to immunity from suit in federal court. *Id.* at 1646. The Court rejected Georgia's argument that "its motive for removal was benign," and was not intended "to obtain litigating advantages for itself," *id.* at 1644, explaining that "[m]otives are difficult to evaluate, while jurisdictional rules should be clear." *Id.* at 1645.

In stark contrast to the argument rejected in *Lapides*, the Second Circuit in *Garcia* did not purport to inquire into New York's subjective intentions at the time it accepted the federal funds said to have effected the waiver. Rather, the court conducted a manifestly objective inquiry into the existing legal circumstances. It concluded that because "the proscriptions of Title II and § 504 are virtually identical, a state accepting conditioned funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damage suits, since *by all reasonable appearances* state sovereign immunity had already been lost." 280 F.3d at 114 (emphasis added) (citing *College Sav. Bank*, 527 U.S. at 682); *cf. Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (describing the objective inquiry into the state of the law to assess claims of qualified immunity).[2]

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[2] The Court's qualified immunity cases also refute the United States' implicit suggestion, *see* U.S. Br. at 10, that an immunity inquiry that turns on the state of the law during the relevant time period is somehow novel. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 640

(Continued on following page)

The Government also complains that the Second Circuit's rule attaches significance to the enactment of the ADA in 1990, four years after the passage of Section 2000d-7, arguing that the later enactment of a separate statute should not change the result of the waiver inquiry. U.S. Br. at 8. But this result necessarily flows from the contractual nature of the waiver analysis. *See Barnes*, 122 S. Ct. at 2100-01. When the offeror has informed the recipient of consideration that he will be deprived of the right whether he takes the offered consideration or not, it is not reasonable to infer, from the acceptance of the consideration, a knowing and intentional decision to waive a constitutional right.

To adopt this Court's analogy, *see College Sav. Bank*, 527 U.S. at 682, no one would suggest that a criminal defendant had validly waived his right to a jury trial in exchange for a lesser sentence if Congress enacted a law abolishing jury trials. *See, e.g., United States v. Ruiz*, 122 S. Ct. 2450, 2455 (2002) ("[T]he Constitution insists, among other things, that the defendant enter a guilty plea that is 'voluntary' and that the defendant must make related waivers 'knowingly, intelligently, [and] with sufficient awareness of the relevant circumstances and likely consequences.'") (citation omitted). This conclusion would hold even though an identical plea bargain struck before the enactment of the statute would be perfectly valid.[3]

(1987) (defendants' claim of immunity must be assessed "in the light of pre-existing law") (citing cases).

[3] The Government suggests that this Court has held that assertions of immunity must be assessed on a claim-by-claim basis. U.S. Br. at 8 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 103 n.12 (1984)). The cited footnote says no such thing; the Court merely rejected an argument that the presence of the United States as a plaintiff somehow vitiated the State's assertion of sovereign immunity with respect to a state law claim brought solely by a private plaintiff in the same case.

b. The United States rests its attempt to downplay the lasting importance of *Garcia* upon its assertion that the Second Circuit implicitly limited its holding to cases arising "at the latest, in 1997. . . . " U.S. Br. at 10. The court implied no such thing. It merely observed in a footnote that "*an argument* could be made that if there is a colorable basis for the state to suspect that an express congressional abrogation is invalid, then the acceptance of funds *might* properly reveal a knowing relinquishment of sovereign immunity." *Garcia*, 280 F.3d at 114 n.4 (emphases added). The footnote went on to explain that "[e]ven supposing such an argument to have merit," it was not available in that case because the events at issue took place at a time "when even the most studied scholar of constitutional law would have had little reason to doubt the validity of Congress's asserted abrogation" in Title II, *id.*, that is, before this Court had decided *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and *City of Boerne v. Flores*, 521 U.S. 507 (1997). The Second Circuit did not even consider whether assertions of immunity in Section 504 cases arising after *City of Boerne* would benefit from *Garcia*, and the issue likewise does not arise in this case because the events giving rise to this suit took place before *City of Boerne*.

Moreover, the Second Circuit's dictum was predicated upon its assumption that a reasonable State would have a basis to question whether its sovereign immunity had been validly abrogated by Title II after *City of Boerne*. The Ninth Circuit, however, has deprived the States in its jurisdiction of any such reasonable basis by holding that Title II *does* validly abrogate the States' sovereign immunity. *See Hason v. Medical Bd. of Cal.*, 279 F.3d 1167, 1171 (9th Cir.) (reaffirming prior precedent), *reh'g en banc denied*, 294 F.3d 1166 (9th Cir.), *petition for cert. filed*, No. 02-479 (U.S. Sept. 23, 2002). Thus, the rule announced in *Garcia* would continue to apply to all cases arising in the Ninth Circuit into the indefinite future. *Compare United States v. Lanier*, 520 U.S. 259, 269 (1997) (in the analogous context of qualified immunity, state of the law

determined by looking to the law of the Circuit) (citing cases).[4]

2. The United States seeks to avoid the implications of this Court's conclusion that 42 U.S.C. § 2000d-7(a)(2) is ambiguous, *see Lane v. Pena*, 518 U.S. 187, 198 (1996), by arguing that the Court should simply ignore subparagraph (2) (describing the remedies available "[i]n a suit against a State") in considering whether Congress has unambiguously conditioned federal funds upon a waiver of sovereign immunity against private damage suits. U.S. Br. at 13-14. Not surprisingly, the Government is unable to cite any authority for this unprecedented suggestion, and this Court's cases effectively repudiate it. In *Lane* itself, the Court expressly considered both subparagraphs (a)(1) and (a)(2) in the course of deciding whether Section 2000d-7(a) effected a waiver of the federal government's sovereign immunity. 518 U.S. at 198-200. More generally, the Court's clear statement jurisprudence forecloses the narrow approach urged by the United States. *See, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 19 (1981) (holding that a statute claimed to have imposed Spending Power condition on the States was "ambiguous . . . when read in the context of other more specific provisions of the Act").

The United States also argues that Section 2000d-7(a)(2) need not clearly and unambiguously condition funds upon a waiver of sovereign immunity that extends to monetary damages; it is sufficient, the Government asserts, to determine "the waiver's scope . . . by a 'realistic assessment of legislative intent.'" U.S. Br. at 14 (quoting *Franconia Assocs. v. United States*, 122 S. Ct. 1993, 2003

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[4] Indeed, the Solicitor General's suggestion that States should have known that they retained their immunity against private suits for damages under Title II as far back as 1997 comes with particularly poor grace when one considers that the United States continues to maintain that Congress' abrogation of sovereign immunity against such claims is constitutional.

(2002) (internal citation omitted)). Once again, the Government's argument is contrary to this Court's ruling in *Lane*. The Court squarely held that "[t]o sustain a claim that the [federal] Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." 518 U.S. at 192; *see also id.* at 197 ("'[W]here a cause of action is authorized against the federal government, the available remedies are not those that are "appropriate," but only those for which sovereign immunity has been expressly waived.'") (citation omitted).

Franconia is not to the contrary; there, the Court merely held that once Congress had clearly waived the federal government's sovereign immunity against suit, statute of "limitations principles should generally apply to the Government 'in the same way that' they apply to private parties." 122 S. Ct. at 2003 (citation omitted). The Court nowhere questioned its holding in *Lane* that "the waiver of sovereign immunity must extend unambiguously to such monetary claims." 518 U.S. at 192.

Finally, the Government claims that its "plausible" reading of the statute, permitting damages against the States even though the language of Section 2000d-7 does not clearly and unambiguously so provide,[5] is necessary to

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[5] The United States briefly argues that "[s]uits against the States for damages . . . fall plainly within the text of Section 2000d-7(a)(2)," because "*Lane* itself made clear that the federal government could be sued for damages for violation of Section 504 when it was sued for its actions as a 'provider' of federal funds." U.S. Br. at 16. In fact, *Lane* said no such thing; after remarking on "the somewhat curious structure of the liability and remedy provisions" of the Rehabilitation Act, the Court simply observed that any waiver could not possibly extend "beyond the narrow category of § 504(a) violations . . . by 'Federal provider[s].'" 518 U.S. at 193. Far from concluding that Congress had clearly and unambiguously waived the federal government's immunity even in this "narrow category," the Court pointedly contrasted "[t]he lack of clarity in [the] 'Federal Provider' provision" with Congress' unambiguous waiver of liability for Section 501 claims. *Id.*

avoid "mak[ing] the statute a practical nullity." U.S. Br. at 16. If Section 2000d-7(a)(2) does not authorize damages suits against the States, the argument goes, it adds nothing, for suits for injunctive relief are already available under *Ex Parte Young*, 209 U.S. 123 (1908). Both the premise and the conclusion the Government would draw from it are flawed.

As to the conclusion, even if application of the clear statement rule would render the statute a "nullity," it does not follow that the rule should not be applied. The goal of the clear statement rule is not to divine the unexpressed intent of Congress; it is to "enable the States to exercise their choice knowingly, cognizant of the consequences of their participation" in a federal program. *Pennhurst*, 451 U.S. at 17. As to the premise: read in accordance with the clear statement rule, Section 2000d-7(a) invites waiver of sovereign immunity against suits seeking declaratory and injunctive relief brought directly against a State or its arm that would not be permissible under the *Young* doctrine. *See, e.g., Alden v. Maine*, 527 U.S. 706, 756-57 (1997).[6]

3. The United States does not deny that this Court has noted, but failed to reach, the "argument that implied causes of action against States (and perhaps nonfederal state actors generally) are inconsistent with the clear

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[6] While admitting that the argument concerning Section 2000d-7 was presented to the court below, the United States argues that the Ninth Circuit's failure to expressly address the issue in its opinion militates against certiorari. U.S. Br. at 12. But the Ninth Circuit has resolutely refused to conduct *any* legal analysis of the serious questions raised by private Section 504 suits for damages against the States, deeming the matter "foreclosed" by Circuit precedent "if they accept federal Rehabilitation Act funds." App. 9a; *see also* App. 22a (O'Scannlain, J., dissenting) ("reluctantly acquiesc[ing]" because bound by Circuit precedent); *Douglas v. California Dep't of Youth Auth.*, 271 F.3d 812, 820-21 (9th Cir. 2001), *reh'g en banc denied*, 285 F.3d 1226 (9th Cir.), *cert. denied*, 122 S. Ct. 2591 (2002); *cf.* 285 F.3d at 1231 (O'Scannlain, J., dissenting from denial of rehearing en banc) (criticizing the Ninth Circuit's "[b]lind adherence" to circuit precedent despite intervening decisions by this Court).

statement rule of *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981)." *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 656-57, 684-85 (1999) (Kennedy, J., dissenting)). Instead, the Government mistakenly claims that Hawaii did not raise this argument in the court below. U.S. Br. at 18. To the contrary, in a supplemental brief submitted in response to the court's order to address sovereign immunity in light of this Court's intervening decisions, petitioners specifically urged the point upon the Ninth Circuit: "Moreover, Congress could never provide the clarity required by *College Savings* because a private suit against a state for violation of Section 504 represents an 'implied cause of action,' permitting courts to fashion any 'appropriate' relief under the 'general rule' discussed in *Franklin v. Gwinnet County Public Schools*, 503 U.S. 60, 71 [(1992)]." Supplemental Letter Brief of Appellants at 5 (No. 00-15534) (9th Cir. April 25, 2001).

On the merits, the United States argues that enactment of Section 2000d-7 satisfies the clear statement rule without more. U.S. Br. at 18.[7] But this argument ignores this Court's insistence that a waiver of sovereign immunity will not arise unless Congress makes clear *in the text* of a statute that States accepting federal funds will be subject to suit for damages. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242-43, 247 (1985); *Pennhurst*, 451 U.S. at 17; *see also Lane*, 518 U.S. at 192 ("[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied") (citations omitted). Section 2000d-7 does not

[7] The Government suggests that the argument recognized as open in *Alexander* merely refers to the question whether "implied causes of action for Spending Clause legislation are *in general* 'inconsistent' with the clear statement rule," a question not encompassing "the text and structure of the relevant statutes" governing Section 504 actions. U.S. Br. at 20 (emphasis in original). This suggestion is belied by the fact that the precise statute at issue here, Section 2000d-7(a), governed the immunity issue in *Alexander* as well. *See Alexander*, 532 U.S. at 280.

meet that high standard, for neither it nor any other statutory text expressly states that *anyone* is subject to suit for violation of Section 504; rather, Section 2000d-7 merely states that the States are not immune from such suits assuming that the right to bring such actions exists in the first place. In order to learn that private suits are permitted, one must look beyond the United States Code to the United States Reports. To suggest that this provides notice sufficient to satisfy the clear statement rule "misses the crucial point that, when it comes to an award of money damages, sovereign immunity places the [States] on an entirely different footing than private parties." *Lane*, 518 U.S. at 196.[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] The statement quoted in the text referred to the Federal Government, not the States, but this Court has repeatedly concluded that it "see[s] no reason why the rule should be different with respect to state sovereign immunity." *College Sav. Bank*, 527 U.S. at 682.